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## THE SUPREME COURT 2012 TERM

### FOREWORD: EQUALITY DIVIDED

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## CONTENTS

I.	RESTRICTING MINORITY-PROTECTIVE EQUAL PROTECTION REVIEW.....	9
A.	<i>From Impact to Purpose</i> .....	11
1.	Before the Court Divided Impact and Purpose .....	12
2.	Restrictions on Impact Evidence .....	15
3.	Discriminatory Purpose and Judicial Deference .....	20
B.	<i>Limiting Civil Rights Laws: A New Role for Judicial Oversight in Equal Protection Cases?</i> .....	23
II.	EXPANDING MAJORITY-PROTECTIVE EQUAL PROTECTION REVIEW.....	29
A.	<i>Strict Scrutiny of Affirmative Action and the Living Constitution</i> .....	31
B.	<i>Comparing Discriminatory Purpose and Strict Scrutiny Doctrines</i> .....	38
1.	Justifications for Strict Scrutiny Before and After <i>Croson</i> .....	38
2.	How Discriminatory Purpose and Affirmative Action Cases Diverge .....	44
3.	<i>Ricci</i> : A Double Standard for Discriminatory Purpose Law? .....	51
III.	EQUALITY DIVIDED IN THE SUPREME COURT'S 2012 TERM .....	59
A.	<i>A Tale of Two Fishers</i> .....	59
B.	<i>Shelby County: Majority-Protective Equality Review, Redux</i> .....	67
C.	<i>Constitutional Conflict and Constitutional Change in the "Marriage Equality" Debates</i> .....	74
1.	Through Backlash to <i>Perry</i> and <i>Windsor</i> .....	77
2.	The Marriage Cases .....	86
IV.	CONCLUSION: EQUALITY'S FUTURE.....	91

# THE SUPREME COURT 2012 TERM

## FOREWORD: EQUALITY DIVIDED

*Reva B. Siegel\**

We, the people, declare today that the most evident of truths — that all of us are created equal — is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.

— President Barack Obama, Second Inaugural Address (2013)<sup>1</sup>

We believe, like Dr. Martin Luther King, Jr. in a colorblind, post-racial society.

— Tea Party Petition to the NAACP (2010)<sup>2</sup>

[T]he arc of the moral universe is long, but it bends toward justice.

— Martin Luther King, Jr. (1965)<sup>3</sup>

**E**qual protection law today is divided. When minorities challenge laws of general application and argue that government has segregated or profiled on the basis of race, plaintiffs must show that gov-

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<sup>1</sup> President Barack Obama, Inaugural Address (Jan. 21, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>).

<sup>2</sup> *No Racism Petition*, TEA PARTY PATRIOTS, <http://web.archive.org/web/20100915052101/http://www.teapartypatriots.org/petition/> (last visited Sept. 29, 2013).

<sup>3</sup> Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965) (transcript and audio recording available at [http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/doc\\_address\\_at\\_the\\_conclusion\\_of\\_selma\\_march/](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march/)) (protesting “Bloody Sunday,” when troopers in Selma, Alabama, attacked blacks seeking voting rights).

ernment acted for a discriminatory purpose, a standard that doctrine has made extraordinarily difficult to satisfy.<sup>4</sup> In discriminatory purpose cases, the ways that citizens experience state action is not constitutionally significant. By contrast, when members of majority groups challenge state action that classifies by race — affirmative action has become the paradigmatic example — plaintiffs do not need to demonstrate, as a predicate for judicial intervention, that government has acted for an illegitimate purpose.<sup>5</sup> Strict scrutiny doctrine imposes restrictions on affirmative action that expressly take into consideration the ways citizens experience state action.<sup>6</sup>

Equal protection cases appeal to *Brown v. Board of Education*<sup>7</sup> and the special harms that racial classifications inflict to justify this divided framework of review.<sup>8</sup> These appeals to *Brown* function much like appeals to Martin Luther King; they imbue claims about civil rights with foundational authority.<sup>9</sup> But the divided equal protection framework that today governs claims of discrimination was not “in” *Brown* or *Loving v. Virginia*.<sup>10</sup> It was forged in decades of conflict over the civil rights project, as judges invoked precedents of the civil rights era, first, to justify new forms of judicial deference in reviewing minority claims of discrimination and, then, to justify new forms of judicial scrutiny in reviewing claims of discrimination brought by whites.<sup>11</sup>

This Foreword demonstrates how a body of constitutional law that began in the aspiration to protect “discrete and insular minorities”<sup>12</sup> has been profoundly transformed by the conflict that enforcing equal protection provokes. It shows that modern discriminatory purpose and strict scrutiny law emerged, not in the era of *Brown*, but decades later, in the desegregation and affirmative action debates of the late twentieth century, as the Court changed constitutional law in response to resistance the civil rights project aroused. As importantly, I show

<sup>4</sup> See *infra* section I.A.2, pp. 15–20.

<sup>5</sup> See *infra* section II.B.1, pp. 39–44; *infra* pp. 46–47.

<sup>6</sup> See *infra* section II.B.2, pp. 45–51.

<sup>7</sup> 347 U.S. 483 (1954).

<sup>8</sup> See, e.g., *infra* notes 86–90 and accompanying text (appealing to *Brown* and the concept of racial classification to explain why courts should review laws of general application with deference); *infra* notes 147–152 and accompanying text (appealing to *Brown* and the concept of racial classification to explain why courts should apply strict scrutiny to affirmative action).

<sup>9</sup> For claims on *Brown*, see, for example, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (containing ninety-one references to the *Brown* litigation, including briefs and secondary articles); *id.* at 747–48 (plurality opinion) (Chief Justice Roberts discussing “which side is more faithful to the heritage of *Brown*,” *id.* at 747). For claims on Martin Luther King, Jr., see, for example, *supra* p. 2.

<sup>10</sup> 388 U.S. 1 (1967).

<sup>11</sup> See *infra* section I.A.2, pp. 15–20; *infra* section II.A, pp. 31–38.

<sup>12</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

how these changes divided equal protection into two branches of doctrine: one branch of equal protection ignores citizens' experience of law and the other is deeply concerned about it. Reading doctrines of discriminatory purpose and strict scrutiny in relation to the desegregation and affirmative action conflicts they address — rather than the early civil rights precedents they cite — explains why equal protection divided into two racially marked branches that demonstrate such different solicitude toward citizens' expectations of fairness. At the same time, this reading identifies forms of reasoning in the cases that could be oriented in new directions by a Court that cared about protecting "all persons"<sup>13</sup> and fashioned a body of equal protection law that was again responsive to the concerns of minority groups.

The differences in empathy that have divided equal protection law can be seen within and across the closely divided constitutional equality decisions of the Supreme Court's 2012 Term. The race cases of the Term consolidate and extend the changes in equality law this Foreword charts. The Court's affirmative action decision in *Fisher v. University of Texas at Austin*<sup>14</sup> renders ordinary what are in fact remarkable, long-term shifts in judicial oversight of equal protection claims.<sup>15</sup> *Fisher* illustrates the equality docket of a Supreme Court that addresses disparate treatment by race in affirmative action programs without addressing minority claims of racial profiling in enforcement of criminal and immigration law.<sup>16</sup> The form of empathy that leads the Court to focus equal protection scrutiny on affirmative action rather than racial profiling shapes the Court's unprecedented decision to strike down a key provision of the Voting Rights Act of 1965<sup>17</sup> in *Shelby County v. Holder*.<sup>18</sup> *Shelby County* interprets equality law with solicitude for Americans who claim they have been injured by laws that protect the rights and opportunities of minorities.<sup>19</sup>

Empathy of a very different kind guides the Court's interpretation of equal protection in the sexual orientation cases of the Term. Like the race cases, the same-sex marriage cases, *United States v. Windsor*<sup>20</sup> and *Hollingsworth v. Perry*,<sup>21</sup> express understandings forged in debates

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<sup>13</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.) ("The guarantees of the Fourteenth Amendment extend to all persons.").

<sup>14</sup> 133 S. Ct. 2411 (2013).

<sup>15</sup> See *infra* section III.A, pp. 59–67.

<sup>16</sup> See *infra* notes 310–332 and accompanying text (discussing equal protection claims concerning racial profiling that the Supreme Court has declined to hear, as well as recent equal protection decisions on profiling in the district courts).

<sup>17</sup> 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

<sup>18</sup> 133 S. Ct. 2612 (2013).

<sup>19</sup> See *infra* section III.B, pp. 67–74; *infra* notes 367–368 and accompanying text.

<sup>20</sup> 133 S. Ct. 2675 (2013).

<sup>21</sup> 133 S. Ct. 2652 (2013).

that have divided the nation for decades. A sharply divided Supreme Court has now intervened in the marriage equality debates — in minority-protective ways. In *this* respect, *Windsor*'s divergence from the race decisions of the Term could not be more striking. For reasons that reflect differences in the debates — or simply in the Court's composition — the marriage decisions of the 2012 Term model minority-protective judicial review of a sort that the Supreme Court no longer provides racial minorities. *Windsor* invites speculation on how American law might grow if an appointment led to a Court willing to provide racial minorities protection of this kind.

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It is not surprising that a body of law that intervenes in race relations has been shaped by conflicts over race. The crucial question is how. Modern equal protection cases anchor themselves in appeals to *Brown* and other precedents of the civil rights era, invoking powerful collective memories of conflicts over Jim Crow. Debate about these bodies of law has long taken the form of a debate about fidelity to *Brown*.<sup>22</sup> But focusing solely on *Brown* can occlude as well as illuminate. Neither the law of discriminatory purpose nor the law of strict scrutiny that the Court applies today was formed in the era of *Brown*. Instead, the modern law of discriminatory purpose and strict scrutiny was formed decades later in disputes over desegregation and affirmative action.<sup>23</sup> Reading the discriminatory purpose and strict scrutiny cases as if they were simply trying to enforce the underlying "principle" of *Brown* abstracts the cases from the historical context in which they were actually decided, and, in the process, diverts attention from other, strikingly divergent features of these two bodies of law.

If we widen the historical lens and examine discriminatory purpose and strict scrutiny law in relation to the disputes in which the doctrines were forged, we arrive at a different understanding of how race has shaped the divided body of equal protection law we have today. In the simplest sense, locating doctrine in history shows that, in fashioning the law of discriminatory purpose and strict scrutiny, the Supreme Court was responding to claims brought by members of different racial groups. Locating doctrine in history identifies a second, more complex sense in which race shaped the divided body of equal protection law we have today. Views about desegregation and affirma-

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<sup>22</sup> See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*] (showing how the debate between antisubordination and anticlassification understandings of equal protection was not framed at the time of *Brown*, but instead emerged in decades of conflict over enforcing *Brown*).

<sup>23</sup> See *infra* section I.B, pp. 23–29; *infra* section II.A, pp. 31–38.

tive action shaped the kinds of judicial review the Court required in discriminatory purpose and strict scrutiny doctrine. In its early decisions, the Court openly reflected on the relationship between racial conflict and its own judicial role. To limit the role of federal courts in the redress of segregation, the Burger Court constructed the law of discriminatory purpose on a thickly elaborated commitment to judicial deference.<sup>24</sup> And to limit affirmative action, the Rehnquist Court subjected the programs to new forms of strict scrutiny that restricted the programs with attention to citizens' expectations of fair dealing.<sup>25</sup>

These differences in judicial oversight matter in practical ways. The body of equal protection law that courts now enforce appeals to *Brown* to impose far greater restrictions on affirmative action than it imposes on the criminal law.<sup>26</sup> Differences in equal protection oversight in turn shape the kinds of democratic deliberation the Court encourages in *Brown's* name. The Court's doctrine and docket focus public debate about race discrimination on affirmative action at a time when increasing numbers of Americans have begun to view our carceral society as "the new Jim Crow."<sup>27</sup>

Shifts in equal protection oversight that began in the late twentieth century are continuing to grow, threatening yet other bodies of civil rights law. Drawing on citizen-attentive forms of oversight in the affirmative action cases, the Roberts Court has recently begun to interpret the law of discriminatory purpose to restrict the disparate impact provisions of employment discrimination law. In doing so, the Court has encouraged majority claimants to make discriminatory purpose arguments about civil rights law based on inferences the Roberts Court would flatly deny if minority claimants were bringing discriminatory purpose challenges to the criminal law.<sup>28</sup>

Equal protection law of this kind is neither colorblind nor evenhanded. Of course, law interpreting the Equal Protection Clause need not aspire to either. *United States v. Carolene Products Co.*<sup>29</sup> famously offered reasons for federal courts to protect minorities in ways that

<sup>24</sup> See *infra* section I.A.3, pp. 20–23.

<sup>25</sup> See *infra* sections II.B.1–2, pp. 38–51.

<sup>26</sup> See *infra* section II.B.2, pp. 44–51.

<sup>27</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW* 6–7 (2012) (discussing “racial dimensions of mass incarceration,” *id.* at 6). But see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101 (2012) (demonstrating the limitations of the Jim Crow analogy).

<sup>28</sup> See *infra* section II.B.3, pp. 51–58 (reading *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), in light of late-twentieth-century debates about purpose and effects standards in equal protection law and in antidiscrimination legislation).

<sup>29</sup> 304 U.S. 144 (1938).

courts do not protect members of majority groups.<sup>30</sup> A court concerned about conflict over civil rights law in the years since *Carolene Products* might decide also to scrutinize the equality claims of majority groups without diminishing its engagement with the equality claims of minority groups. As Justices Brennan, White, Marshall, and Blackmun suggested, intervention on behalf of majority groups can be an integral part of minority-protective oversight.<sup>31</sup>

But this is not the body of equal protection law that we have. Over the decades, the Court has restricted judicial oversight of minority claims as it intensified judicial oversight of majority claims, transforming review in the *Carolene Products* tradition into something very different: a form of judicial review that cares more about protecting members of majority groups from actions of representative government that promote minority opportunities than it cares about protecting “discrete and insular minorities” from actions of representative government that reflect “prejudice.”

As this examination of equal protection history shows, equal protection law has been profoundly shaped by the conflicts it has engendered. When law intervenes in historically entrenched status relations, the intervention can prompt mobilization of various kinds; and, as equality law unsettles authority, the law may itself be transformed by the resistance it arouses. For these reasons, equality law can engender deep forms of change that are not apparent — as well as apparent

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<sup>30</sup> See *id.* at 152 n.4 (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170–72 (1980) (applying representation-reinforcing review in the *Carolene Products* tradition to the case of affirmative action).

Debate about whether equal protection law should be equally concerned with harms to minority and majority groups began in the era of *Brown*. See, e.g., Siegel, *Equality Talk*, *supra* note 22, at 1489–97 (showing that when Herbert Wechsler criticized *Brown* as lacking neutral principles, “[a]n array of prominent critics moved to demonstrate that the claims of blacks and whites were not commensurable and that it was possible to make a principled choice between them”). For a prominent expression of the view that equal protection should focus on laws that enforce or aggravate the subordination of groups, written in the era of the discriminatory purpose and affirmative action debates, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (proposing a “group-disadvantaging principle” as a mediating principle for the Equal Protection Clause).

<sup>31</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“[A] number of considerations . . . lead us to conclude that racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’” (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam))).

change that is not deep.<sup>32</sup> Considering how equality law responds to the resistance it arouses is part of respecting law's aspirations as law.

With these concerns, the Foreword examines conflicts unfolding in politics in terms that never stray far from the story of conflict unfolding in law. Changes in the interpretation of the Equal Protection Clause may reflect the workings of a democratic order in which citizens can mobilize for constitutional change, and Presidents — courting voters — can nominate as judges persons believed to have compatible views about the great constitutional controversies of their day.<sup>33</sup> Yet, rather than focus on the clash of movements for constitutional change from the bottom up, or strategies of voter realignment from the top down, this account examines conflict beyond the courthouse through the reasoning of the cases.<sup>34</sup> It lets judges themselves recount how they abstracted constitutional principles from the racial conflicts of their day, and then considers how these decisions came cumulatively to structure doctrine. This framing of the story invites reflection on the interplay of constitutional principle and constitutional politics in different settings, and from different angles, without relinquishing engagement with equal protection doctrine as law.<sup>35</sup> It reminds us that some participants in constitutional change are exceedingly self-conscious about their role in reorienting the law — while many are not. The Foreword's return to history invites consideration, across generations, of why and how equal protection law has evolved, and it identifies some contemporary contexts in which to consider the stakes.

Part I of the Foreword examines the restrictions judges imposed on minority-protective equal protection oversight during the desegregation debates of the 1970s through the discriminatory purpose decisions

<sup>32</sup> For an account of deep change through law that is not formally recognized, see, for example, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]. For an account of formal change in law that is not deep, see, for example, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*].

<sup>33</sup> On judicial selection and party realignment, see, for example, sources cited *infra* notes 71–72 (discussing President Nixon) and *infra* note 164 (discussing President Reagan).

<sup>34</sup> For accounts that show the interaction of bottom-up and top-down forces of constitutional change, see Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); and Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE L.J. 2028, 2052–71 (2011), reprinted in LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 263 (2012), available at [http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd\\_1.pdf](http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf). For an account that examines political conflict inside the reasoning of the cases, see Siegel, *Equality Talk*, *supra* note 22.

<sup>35</sup> See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (analyzing the practice of constitutional interpretation as coordinating commitments to rule of law and democratic self-governance).



of the Burger Court. Part II traces the rise of majority-protective equal protection oversight in the affirmative action–strict scrutiny decisions of the Rehnquist Court, and contrasts the forms of oversight provided by the discriminatory purpose and strict scrutiny cases today. Part II concludes by demonstrating how the logic of the affirmative action decisions is now beginning to reshape discriminatory purpose doctrine in the decisions of the Roberts Court. Part III follows the story of law’s transformation through conflict in the sharply divided constitutional equality decisions of the Supreme Court’s 2012 Term. It contrasts majority- and minority-protective review in the race and sexual orientation decisions of the Term, showing how the two lines of cases demonstrate competing understandings of a tradition that could develop in very different ways. A Conclusion draws on this account of equal protection’s transformation to consider how minority-protective understandings of equal protection might yet again grow.

## I. RESTRICTING MINORITY-PROTECTIVE EQUAL PROTECTION REVIEW

Today, courts reviewing equal protection challenges to facially neutral laws brought by members of minority groups proceed under law that directs judges to defer to representative government, while courts reviewing equal protection claims brought by members of majority groups strictly scrutinize challenges to affirmative action. The cases explain that classification is so distinctively harmful that doctrines of oversight and deference are organized around it.<sup>36</sup> By returning us to a period well before “classification” counted as a reason sharply to restrict minority-protective review and strictly to review claims of discrimination brought by members of majority groups, equal protection history can supply an alternative perspective on equal protection doctrines of judicial deference and oversight.

At the opening of the 1970s, racial classification did not have the constitutional significance we attach to it today. It is now common to talk about fidelity to *Brown* as a question concerning racial classifications,<sup>37</sup> but *Brown* did not speak about the wrongs of racial classifica-

<sup>36</sup> See, e.g., *infra* notes 86–90 and accompanying text (appealing to *Brown* and the concept of racial classification to explain why courts should review laws of general application with deference); *infra* notes 148–152 and accompanying text (appealing to *Brown* and the concept of racial classification to explain why courts should apply strict scrutiny to affirmative action). On the distinctive harms of racial classification, see, for example, *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (“[R]acial classifications . . . are potentially so dangerous that they may be employed no more broadly than the interest demands.”).

<sup>37</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (plurality opinion) (Chief Justice Roberts discussing fidelity to *Brown* in regard to racial classification). Of course, this understanding remains contested. See *id.* at 803 (Breyer, J., dissenting) (asserting that the race-conscious school assignment plans at issue in the case “represent[ed] local

tions.<sup>38</sup> Instead, *Brown* focused on the harms of segregation; the decision observed that feelings of inferiority engendered by segregation might affect the “hearts and minds” of school children, and pointed to social science evidence of the harm segregation could inflict<sup>39</sup> — claims that led critics to challenge the Court’s authority to decide which harms and whose harms were of constitutional significance.<sup>40</sup> It was not until the 1960s — after a decade of massive resistance, continuing debate, and the passage of groundbreaking civil rights legislation<sup>41</sup> — that Fourteenth Amendment cases began expressing the principle underlying *Brown* as a presumption against racial classification. *Loving* employed strict scrutiny triggered by a presumption against racial classification to invalidate a law prohibiting interracial marriage,<sup>42</sup> advertizing to “White Supremacy”<sup>43</sup> without discussing the citizen’s experience of segregation or its harms in the terms that attracted controversy in *Brown*. The presumption against racial classification expressed judgments about constitutionality in the form of an abstract principle that some hoped might minimize contentious claims about which harms and whose harms the Equal Protection Clause redressed.<sup>44</sup>

But the meaning of a principle born in conflict would not be established without decades more conflict. Most prominently, the presumption against racial classifications did not address the constitutionality of state action that inflicted harm on minorities without mentioning race. In *Loving*’s era, this question was regularly presented in cases arising outside the South, in regions where racial segregation was entrenched through forms of state action that made no express reference

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efforts to bring about the kind of racially integrated education that *Brown* . . . long ago promised”).

<sup>38</sup> Siegel, *Equality Talk*, *supra* note 22, at 1481. The Court invoked the wrongs of classification in a companion case that prohibited segregated schools in the District of Columbia, and so was decided on Fifth Amendment grounds. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>39</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954).

<sup>40</sup> See Siegel, *Equality Talk*, *supra* note 22, at 1484–97.

<sup>41</sup> See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (forthcoming 2014) (recounting the passage of civil rights legislation); TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 105–251* (2011) (tracing civil rights protest in the decade after *Brown*); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 326–442* (2004) (considering how massive resistance in the wake of *Brown* catalyzed support for civil rights outside the South).

<sup>42</sup> See *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (holding that Virginia’s miscegenation statutes, which classified by race, did not meet the “very heavy burden of justification” required by the Fourteenth Amendment).

<sup>43</sup> *Id.* at 11 (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

<sup>44</sup> See Siegel, *Equality Talk*, *supra* note 22, at 1497–99 (recounting how the difficulties of enforcing *Brown* in the midst of backlash led some to see virtue in stating the law through more abstract presumptions about constitutionality).

to race. In the 1960s and 1970s, many judges closely scrutinized state action in these contexts also, considering the impact of facially neutral laws in order to protect minorities against the harms of segregation, as the presumption against racial classification did.

Attention to the racial disparate impact of state action was a regular feature of judicial oversight during this period, when judges deciding equal protection cases did not draw the sharp line between proof of purpose and impact that they do today.<sup>45</sup> Responding to the fierce objections these decisions prompted, the Burger Court shaped doctrine on discriminatory purpose to rein in judicial oversight; the Court began to interpret the presumption against racial classification to mean that judges should defer to representative government in reviewing challenges to segregation involving laws of general application.<sup>46</sup>

What returning to the cases makes vivid is that the discriminatory purpose decisions direct judicial withdrawal, despite government's entanglement in persisting racial stratification, on the understanding that the political branches, and not the federal courts, would lead the nation beyond segregation's legacies. In this era of judicial retrenchment, few imagined equal protection as a judicially enforceable limit on representative government's authority to redress *de facto* segregation.

### A. *From Impact to Purpose*

In 1970, in a speech against busing, President Richard Nixon called upon federal courts to restrict equal protection liability to cases where there was discriminatory intent.<sup>47</sup> He made this appeal because it then remained an open question how the Court would determine what government practices violated the Equal Protection Clause in cases where segregation was not expressly enforced by law. Supreme Court decisions determining when formerly segregated Southern school districts were unitary within the meaning of the Equal Protection Clause often looked to the consequences and effects of state action in determining its constitutionality.<sup>48</sup> Several other prominent Supreme Court deci-

<sup>45</sup> See *infra* section I.A.1, pp. 12–15.

<sup>46</sup> See *infra* section I.A.3, pp. 20–23.

<sup>47</sup> Statement About Desegregation of Elementary and Secondary Schools, PUB. PAPERS 304, 309–10 (Mar. 24, 1970), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2923&st=&st1=> ("In determining whether school authorities are responsible for existing racial separation — and thus whether they are constitutionally required to remedy it — the *intent* of their action in locating schools, drawing zones, etc., is a crucial factor.").

<sup>48</sup> See, e.g., *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (ruling that carving out a new school district hindered the dismantling of a state-enforced dual system that formally ended six years earlier); *id.* at 462 ("[A]n inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.'" (quoting *Davis v. Bd. of*

sions of the era suggested that the racial impact of a law was crucial in determining whether the Equal Protection Clause was violated. For example, in *Hunter v. Erickson*,<sup>49</sup> the Court invalidated a city charter amendment that would have subjected antidiscrimination ordinances to special popular referenda.<sup>50</sup> The Court observed that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."<sup>51</sup>

What role did "the law's impact . . . on the minority" play in determining whether state action violated the Equal Protection Clause? Supreme Court cases did not clearly settle the question, but they were not the only available authority. There were numerous decisions of the federal courts of appeals in the early 1970s that held that the racial impact of state action would play a central role in determining its constitutionality under the Equal Protection Clause — a stream of cases making their way to the Court for review.

1. *Before the Court Divided Impact and Purpose.* — In this period, equal protection law did not sharply distinguish proof of purpose and proof of impact as it does today. Federal courts evaluating equal protection claims considered the racial disparate impact of government policies in at least two ways. Some courts looked to the racial impact of state action as the ground on which to determine its constitutionality.<sup>52</sup> Other courts viewed evidence of foreseeable impact as highly probative of the government's purposes. During the 1970s, these two

Sch. Comm'rs, 402 U.S. 33, 37 (1971)); see also *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968) (similar).

<sup>49</sup> 393 U.S. 385 (1969).

<sup>50</sup> *Id.* at 390-93 (holding that a city charter amendment requiring a referendum to implement any ordinance that regulated transactions of real property on the basis of race violated the Equal Protection Clause).

<sup>51</sup> *Id.* at 391 (citing *Anderson v. Martin*, 375 U.S. 399 (1964), which invalidated a law requiring racial identification on a ballot). In *Hunter*, the Court noted that the amendment drew "no distinctions among racial and religious groups," *id.* at 390, but found that fact immaterial because the amendment had the effect of disadvantaging enactment of legislation on behalf of minorities, *id.* at 393. For another example, see *Palmer v. Thompson*, 403 U.S. 217 (1971), which upheld a city's decision to close all of its public swimming pools rather than integrate them, *id.* at 226, emphasizing that the decision affected whites and blacks equally and remarking upon "the hazards of declaring a law unconstitutional because of the motivation of its sponsors," including the difficulty of "ascertain[ing] the motivation, or collection of different motivations, that lie behind a legislative enactment," *id.* at 224.

<sup>52</sup> See *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148-50 (5th Cir. 1972) ("[T]his Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown." *Id.* at 150.); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) (finding segregated schools violated the Constitution); *id.* at 497 ("Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.").

lines of appellate decisions provided authority for plaintiffs challenging state action with segregative effects.

Federal courts of appeals tied judgments about equal protection liability directly to the racially disparate effects of government policy in a number of cases involving residential segregation, for example, in cases where judges looked to the impact of zoning or urban renewal policies that had adverse effects on minority communities.<sup>53</sup> A court finding racial disparate impact would then shift the burden to the government to justify the challenged action. As the Seventh Circuit put it in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,<sup>54</sup> “[r]egardless of the Village Board’s motivation, if this alleged discriminatory effect exists, the decision violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest.”<sup>55</sup>

Reasoning along similar lines, courts employed effects tests to evaluate claims of public-sector employment discrimination that occurred before Title VII of the Civil Rights Act of 1964<sup>56</sup> was amended to cover state employers in 1972.<sup>57</sup> Here judges drew on concepts of discrimination that the Burger Court set forth in its first decision interpreting Title VII, *Griggs v. Duke Power Co.*,<sup>58</sup> and extended the statutory concept of disparate impact to equal protection claims arising in public-sector employment relations.

*Griggs* allowed employees to challenge facially neutral business practices that had a racially exclusionary impact. The disparate impact standard required no proof of intent, though the record in the

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<sup>53</sup> For zoning, see, for example, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409, 413 (7th Cir. 1975), *rev’d*, 429 U.S. 252 (1977), which challenged a government refusal to rezone property for low and moderate income housing. See also *S. Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (observing that “apart from voter motive,” if the discriminatory effect of the zoning referendum “is to deny decent housing and an integrated environment to low-income residents,” then that raises a “substantial constitutional question” under the Equal Protection Clause). For urban renewal, see, for example, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), which held that unintentional discrimination in the disproportionate removal of minority residents from their communities in an urban renewal plan could support an equal protection challenge. See *id.* at 931 (“‘Equal protection of the laws’ means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, ‘we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.’” (quoting *Hobson*, 269 F. Supp. at 497)); see also *Gautreaux v. Romney*, 448 F.2d 731, 738 (7th Cir. 1971) (“Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools.”).

<sup>54</sup> 517 F.2d 409, *rev’d*, 429 U.S. 252.

<sup>55</sup> *Id.* at 413.

<sup>56</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

<sup>57</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1)-(5), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

<sup>58</sup> 401 U.S. 424 (1971).

*Griggs* case suggested that the impact standard might probe for covert bad purpose and remedy structural discrimination (decisions that perpetuate the effects of an organization's own past discrimination or discrimination by actors in related domains).<sup>59</sup> The Supreme Court ruled, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>60</sup> "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>61</sup>

During the 1970s, when plaintiffs brought equal protection challenges to public employment selection criteria with a racially exclusionary impact, at least eight federal courts of appeals employed disparate impact frameworks in adjudicating these lawsuits,<sup>62</sup> all importing to the constitutional context the liability rule that had been set down in *Griggs*.<sup>63</sup> In *Castro v. Beecher*,<sup>64</sup> for example, the court's appeal to *Griggs* to resolve the constitutional question was explicit: "[W]e rely in part on the Supreme Court's opinion in *Griggs v. Duke Power Co.* . . . . Although differing from the present case in the respect[] that it was a decision under Title VII of the Civil Rights Act of 1964[,] . . . [w]e cannot conceive that the words of the Fourteenth Amendment, as it has been applied in racial cases, demand anything less."<sup>65</sup>

In other contexts, courts of appeals employed impact evidence differently: they looked to a policy's foreseeable effects as evidence of the government's presumed purposes. While a disparate impact inquiry

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<sup>59</sup> See *id.* at 430 ("Because they are Negroes, petitioners have long received inferior education in segregated schools . . .").

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 431.

<sup>62</sup> See *Davis v. Washington*, 512 F.2d 956, 958-59 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976); *Vulcan Soc'y of the N.Y.C. Fire Dep't v. Civil Serv. Comm'n*, 490 F.2d 387, 392-93 (2d Cir. 1973); *Harper v. Kloster*, 486 F.2d 1134, 1137 (4th Cir. 1973) (holding that promotional list requirements were properly voided by the district court because the requirements had the potential to impose an "adverse effect on blacks and that this potential amounted to a denial of equal protection of the laws"); *Baker v. Columbus Mun. Separate Sch. Dist.*, 462 F.2d 1112, 1114 (5th Cir. 1972) ("Whenever the effect of a law or policy produces such a racial distortion it is subject to strict scrutiny. . . . In order to withstand an equal protection attack it must be justified by an overriding purpose independent of its racial effects."); *Castro v. Beecher*, 459 F.2d 725, 731 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), *aff'd in part, vacated in part*, 452 F.2d 315 (8th Cir. 1972) (en banc); *Crockett v. Green*, 388 F. Supp. 912, 917-18 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1087-92 (E.D. Pa. 1972), *aff'd in part, vacated in part*, 473 F.2d 1029 (3d Cir. 1973) (en banc).

<sup>63</sup> The district court in *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, relied heavily on *Griggs*. See *id.* at 1102-03.

<sup>64</sup> 459 F.2d 725.

<sup>65</sup> *Id.* at 732-33.

involved a court in weighing the government's justifications for the impact-causing policy, the foreseeability framework offered a potentially more deferential form of review, as it allowed government defendants the opportunity to persuade the court that the government had a constitutionally legitimate reason for the impact-causing policy.

Inquiry into the foreseeable racial effects of challenged government action was a common feature of school desegregation litigation in the mid-1970s.<sup>66</sup> In *Keyes v. School District No. 1*,<sup>67</sup> the first school desegregation decision outside the South, the Court indicated that "segregative intent"<sup>68</sup> of some kind was needed to make out an equal protection violation: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."<sup>69</sup> Many courts of appeals evaluating challenges to school segregation after *Keyes* inferred segregative intent from the foreseeable effects of districting policy, as judges repeated that "a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation."<sup>70</sup>

2. *Restrictions on Impact Evidence.* — But the federal courts gradually began to shift course, as a President who appealed to voters deeply critical of the Court's desegregation initiatives in education and

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<sup>66</sup> See, e.g., Paul R. Dimond, *School Segregation in the North: There Is but One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1, 8 (1972) ("[S]earch for motivation leads to substantial agreement with the impact approach as to what may finally be ruled unconstitutional . . . . From such racial effects, racial motivation is inferred." (emphasis added)); cf. Owen M. Fiss, *The Charlotte-Mecklenburg Case — Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 706-07 (1971) (describing an alternate theory for attributing responsibility for school segregation that would "hold the school board responsible for the foreseeable and avoidable consequences of its own action," *id.* at 706).

<sup>67</sup> 413 U.S. 189 (1973).

<sup>68</sup> *Id.* at 206.

<sup>69</sup> *Id.* at 208. Justice Powell wrote separately to emphasize that there was no meaningful distinction between the "de jure" segregation practiced in Southern schools and the putatively "de facto" segregation that districting policies enforced outside the South. *Id.* at 218-19 (Powell, J., concurring in part and dissenting in part) (criticizing "the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South[,] . . . [as] the evil of operating separate schools is no less in Denver than in Atlanta" (footnote omitted)).

<sup>70</sup> *United States v. Sch. Dist.*, 521 F.2d 530, 535-36 (8th Cir. 1975). For other appellate decisions considering foreseeable impact under *Keyes*, see *United States v. Texas Education Agency*, 532 F.2d 380, 388 (5th Cir. 1976); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 181 n.3, 182 (6th Cir. 1974); and *Hart v. Community School Board of Education*, 512 F.2d 37, 49-51 (2d Cir. 1975). Before *Keyes*, some circuits did not require a showing of intent. For examples, see cases cited *supra* note 52.

housing<sup>71</sup> began to appoint new judges to the federal bench,<sup>72</sup> and as popular objections to the desegregation decisions of the Warren Court mounted.<sup>73</sup> This reorientation occurred on a wide range of doctrinal fronts, at the same time as it reverberated through the equal protection cases. Over the decade, the Burger Court restricted judicial oversight of representative government, through decisions addressing the elements of an equal protection violation and how it could be proved.

The Burger Court restricted judicial oversight in equal protection cases, not only by requiring proof of discriminatory purpose, but also by narrowly defining it. In *Washington v. Davis*,<sup>74</sup> the Court rejected the many circuit decisions that employed the *Griggs* disparate impact framework to evaluate discrimination complaints against public employers under the Equal Protection Clause,<sup>75</sup> and upheld the District of Columbia's decision to use an employment exam for hiring police that had a pronounced racial disparate impact. The Court held that, under the Equal Protection Clause, plaintiffs could not make out a constitutional violation by proving racial disparate impact; they would now have to demonstrate discriminatory purpose.<sup>76</sup> Yet *Davis* left

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<sup>71</sup> On Republican efforts to appeal to voters in the South affiliated with the Democratic Party, but disaffected with its role in enacting the civil rights legislation of the 1960s, see, for example, James Boyd, *Nixon's Southern Strategy: It's All in the Charts*, N.Y. TIMES, May 17, 1970, § 6 (Magazine), at 25 (profiling Kevin Phillips and detailing his role in crafting the Republican demographic strategy of the early 1970s). See also KEVIN M. KRUSE, WHITE FLIGHT 251–58 (2005) (recounting “white flight” in reaction to court-ordered desegregation in Atlanta during the 1960s and 1970s, and President Nixon’s appointment of conservative judges to appeal to voters who opposed these desegregation efforts).

<sup>72</sup> President Richard Nixon had the opportunity to appoint four Justices to the Supreme Court (Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist), and many judges to the lower federal courts. He appointed with an interest in reining in the desegregation decisions of the Warren Court. See KEVIN J. MCMAHON, NIXON’S COURT 209–11 (2011). For an insider account, see JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 47 (2001) (quoting Nixon’s sustained colloquies with his colleagues, in which he requested that any Supreme Court nominee be “against busing, and against forced housing integration”). For discussion of President Nixon’s “southern strategy” and judicial appointments, see DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 97–125 (1999). On his lower court appointments, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 205–06 (1997). For an assessment of President Nixon’s record in civil rights that documents its liberal as well as conservative dimensions, see 3 ACKERMAN, *supra* note 41.

<sup>73</sup> On grassroots mobilizations in the South, see, for example, KRUSE, *supra* note 71, at 251–58; and MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 148–221 (2006). For one view of the North, see JONATHAN RIEDER, CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM 109–18, 201–32 (1985) (detailing the reaction of Brooklyn Jews and Italians to busing and other policies promoting racial integration).

<sup>74</sup> 426 U.S. 229 (1976).

<sup>75</sup> *Id.* at 244–45.

<sup>76</sup> See *id.* at 239.



open multiple evidentiary pathways to proving purpose. The Court did not repudiate appellate decisions that looked to a policy's foreseeable impact for evidence of the government's purpose; indeed, Justice Stevens made a point to emphasize this approach in his concurring opinion in *Davis*.<sup>77</sup> Writing for the Court, Justice White held that "invidious discriminatory purpose may often be inferred from the totality of the relevant facts."<sup>78</sup>

It was not until 1979, in the sex discrimination case of *Personnel Administrator v. Feeney*,<sup>79</sup> that the Court moved decisively to restrict the ways that evidence of foreseeable impact could be used to prove unconstitutional purpose.<sup>80</sup> Massachusetts gave veterans an overwhelming preference in civil service examinations, at a time when federal law sharply restricted women's military service and just two percent of veterans in Massachusetts were women; the exclusionary impact of the veterans preference was so great that to get women to work in low-level clerical jobs the state had to exempt them from the

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<sup>77</sup> See *id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."). The *Davis* majority did not expressly reject Justice Stevens's claim that discriminatory purpose could be inferred (perhaps exclusively) from foreseeable impact; hypothetically, the totality of relevant facts in a given case could consist of impact evidence.

In a number of school desegregation cases, federal courts of appeals interpreted *Davis* as allowing a burden shift on evidence of *foreseeable* racial impact. *E.g.*, *United States v. Tex. Educ. Agency*, 579 F.2d 910, 913–14 (5th Cir. 1978) (rejecting the school district's argument that using "the reasonably foreseeable consequences of their acts" to infer discriminatory purpose "reinstates the type of effect test condemned in *Washington v. Davis* and *Arlington Heights*," *id.* at 913); *Arthur v. Nyquist*, 573 F.2d 134, 142 (2d Cir. 1978) ("When . . . actions have the 'natural, probable, and foreseeable result of increasing or perpetuating segregation,' a presumption of segregative purpose is created." (citing *Oliver v. Mich. State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974))); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1046–48 (6th Cir. 1977) (similar); *United States v. Sch. Dist.*, 565 F.2d 127, 128 (8th Cir. 1977) (en banc) (per curiam) (finding discriminatory purpose because evidence of the foreseeable consequences of the school district's acts was not "effectively rebutted" by the district). *But see* *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977) (stating that under *Davis* awareness of probable disproportionate impact is not enough to show discriminatory purpose).

<sup>78</sup> *Davis*, 426 U.S. at 242. For a reading of *Davis* emphasizing that the decision left open proof of intent by appealing to context rather than demanding proof of the mental state of government actors, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1806–08 (2012). In this wide-ranging history of the Supreme Court's intent doctrine, Professor Haney-López describes the Court's shifting, after *Davis*, from context- to motive-based views of intent. He argues that the Burger Court's subsequent demand for proof of "malicious intent" was allied to the rise of colorblindness in the affirmative action cases, or what he terms "intentional blindness." See *id.* at 1786.

<sup>79</sup> 442 U.S. 256 (1979).

<sup>80</sup> In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and the jury case of *Castaneda v. Partida*, 430 U.S. 482 (1977), the Supreme Court reaffirmed that plaintiffs could use evidence of a policy's racial disparate impact to prove that the policy had a discriminatory purpose, even if, outside the jury setting, sole reliance on impact evidence would rarely suffice. See *Arlington Heights*, 429 U.S. at 266; *Castaneda*, 430 U.S. at 493–94.

statute's operation.<sup>81</sup> While the district court initially invalidated the law, focusing on the exclusionary means by which the state chose to pursue the legitimate end of rewarding veterans,<sup>82</sup> after *Davis*, the lower court reasoned that it should analyze the "totality of the relevant facts"<sup>83</sup> in determining legislative intent, including whether "official acts or policies . . . had the natural, foreseeable and inevitable effect of producing a discriminatory impact."<sup>84</sup> Examining the record, the court decided that Massachusetts plainly understood what it was doing, and concluded: "By intentionally sacrificing the career opportunities of its women in order to benefit veterans, the Commonwealth made a constitutionally impermissible value judgment."<sup>85</sup>

The Supreme Court reversed in an opinion that appealed to precedents of the Second Reconstruction to limit the role of courts in constitutional democracy.<sup>86</sup> Invoking *Brown* and *McLaughlin v. Florida*<sup>87</sup> — the first equal protection-strict scrutiny case decided under the Fourteenth Amendment<sup>88</sup> — the Court sharply distinguished between laws that classified on constitutionally suspect grounds, and those laws that did not.<sup>89</sup> In the absence of suspect classifications, *Feeney* suggested that federal courts should accord rational basis deference to legislation:

Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a

<sup>81</sup> *Feeney*, 442 U.S. at 284–85 (Marshall, J., dissenting).

<sup>82</sup> See *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (pointing out that the program might survive review if the preference were the only way the state could assist veterans in this domain, "[b]ut, the fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women"), *vacated sub nom. Massachusetts v. Feeney*, 434 U.S. 884 (1977); see also *id.* at 501 (Campbell, J., concurring). The holding of the district court prompted a lengthy partial dissent focused on the institutional considerations that should limit the ways courts enforce equal protection. See *id.* at 502 (Murray, J., concurring in part and dissenting in part) (emphasizing that the Supreme Court was directing federal courts to incorporate "[c]onsiderations of federalism and separation of powers" in deciding how to enforce equal protection challenges to state legislation).

<sup>83</sup> *Feeney v. Massachusetts*, 451 F. Supp. 143, 147 (D. Mass. 1978) (quoting *Davis*, 426 U.S. at 240) (internal quotation marks omitted), *rev'd*, *Feeney*, 442 U.S. 256.

<sup>84</sup> *Id.* (citing *Davis*, 426 U.S. at 240). Observing that *Davis* allowed proof of intent by inference, the court reasoned, "[n]othing in *Davis* would indicate rejection in equal protection cases of [the] long-standing principle" that "a person is deemed to intend the natural, probable and foreseeable consequences of his actions," noting that Justice Stevens had emphasized in concurring that "this precept had continuing vitality." *Id.* at 147 n.7.

<sup>85</sup> *Id.* at 150 (emphasizing the availability of "less drastic alternatives").

<sup>86</sup> See *Feeney*, 442 U.S. at 272.

<sup>87</sup> 379 U.S. 184 (1964).

<sup>88</sup> See Siegel, *Equality Talk*, *supra* note 22, at 1502.

<sup>89</sup> See *Feeney*, 442 U.S. at 272.

particular law reverberates in a society, is a legislative and not a judicial responsibility.<sup>90</sup>

To ensure that courts deferred to representative government, *Feeney* sharply restricted the role of foreseeable-impact evidence in proving discriminatory purpose. The Court now required plaintiffs to prove discriminatory purpose of a kind that evidence of a policy's foreseeable racial impact was not likely to illuminate<sup>91</sup>: "Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>92</sup> Dissenting, Justice Marshall, joined by Justice Brennan, bitterly objected that "[w]here the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme."<sup>93</sup> But the majority had defined discrimination in such a way as to bar longstanding burden-shifting presumptions of this kind.

*Davis* and *Feeney* together changed the structure of equal protection doctrine. In the decade after *Loving*, there was no radical disjuncture in equal protection scrutiny of legislation employing racial classifications and equal protection scrutiny of facially neutral state action with racial disparate impact.<sup>94</sup> In this period, as courts scrutinized policies lacking express racial classifications, they looked to purpose and impact as interrelated ways of probing the legitimacy of state action.<sup>95</sup> Together the Burger Court discriminatory purpose decisions

<sup>90</sup> *Id.* at 271–72 (citations omitted); cf. *Washington v. Davis*, 426 U.S. 229, 246 (1976) ("As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.").

<sup>91</sup> The Court limited the inferences that could be drawn from evidence of foreseeable effects. See *Feeney*, 442 U.S. at 279 n.25 ("This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. . . . But . . . [w]hen, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, . . . the inference simply fails to ripen into proof.").

<sup>92</sup> *Id.* at 279 (footnote omitted) (citation omitted).

<sup>93</sup> *Id.* at 284 (Marshall, J., dissenting).

<sup>94</sup> Plaintiffs challenging a facially neutral statute had the burden of proof, but federal courts allowed plaintiffs to meet that burden by evidence of a policy's racial disparate impact, with courts often reasoning either (1) that pronounced racial impact alone shifted the burden of persuasion to the government to justify the policy, see, e.g., *supra* note 55 and accompanying text; *supra* note 62 and accompanying text, or (2) that foreseeable racial impact (alone or with other factors) offered a basis on which to infer discriminatory purpose, which the government would then have the burden of disproving, see, e.g., *supra* note 77.

<sup>95</sup> See, e.g., *supra* note 70 and accompanying text; *supra* note 77 and accompanying text; cf. Haney-López, *supra* note 78, at 1785 (emphasizing that "a contextually grounded evaluation of governmental purposes undergirded the Court's dismantling of Jim Crow segregation").

changed equal protection law, first by sharply differentiating review of race-based and facially neutral statutes, and, then, by sharply differentiating proof of purpose and proof of impact. In cases where the state had not classified by race, *Feeney* now authorized courts to review equal protection claims under presumptions associated with "rational basis" deference to democratic ordering.<sup>96</sup> *Feeney* restricted the regular use of impact evidence for proving purpose under *Keyes* and *Davis*.<sup>97</sup> In the process, *Feeney* insulated facially neutral action with foreseeable racial disparate impact from constitutional challenge by offering federal judges tools, including the requirement of proving specific intent, that judges could use to make plaintiffs' burden of proof impossible, for all practical purposes, to discharge.<sup>98</sup>

3. *Discriminatory Purpose and Judicial Deference.* — The aim of the Burger Court's discriminatory purpose decisions was to limit dramatically the power of federal courts to intervene in democratic decisionmaking. The Court was quite explicit about the institutional considerations the discriminatory purpose decisions served. The Burger Court repeatedly explained that it was for representative government, and not the federal courts, to guide the nation beyond the legacies of segregation. These institutional concerns, sounding in separation of powers and federalism, supply the central justification for the Court's decision to restrict the scope of the judicially enforceable Equal Protection Clause in constitutional challenges to facially neutral statutes with racial disparate impact. In *Washington v. Davis*, the Court justified its refusal to find disparate impact liability under the Equal Protection Clause with a passing claim about equal treatment,<sup>99</sup> but it dwelled at length on institutional considerations, objecting to the "far reaching" consequences of adopting under the Equal Protection Clause the disparate impact standard used to evaluate employment discrimination claims arising under Title VII.<sup>100</sup> The Court emphasized differences

<sup>96</sup> See *supra* note 90 and accompanying text.

<sup>97</sup> For lines of appellate decisions restricted by *Feeney*, see, for example, *supra* note 70 and accompanying text; and *supra* note 77 and accompanying text.

<sup>98</sup> Ian Haney-López observes that, in the years since *Feeney*, the Supreme Court itself has proven uninterested in examining the subjective motives of officials accused of discriminating against minorities. See Haney-López, *supra* note 78, at 1855 ("[T]hough the Court claimed to require proof of malicious intent, in no case alleging discrimination against non-Whites did the Court parse the precise mindsets of contemporary government officials."). Federal courts have regularly invoked *Feeney* in order to reject claims of discriminatory purpose. For examples, see *infra* notes 244–248 and accompanying text.

<sup>99</sup> See *Washington v. Davis*, 426 U.S. 229, 245 (1976) (noting "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups" (alteration in original) (quoting U.S. CONST. amend. XIV, § 1)).

<sup>100</sup> *Id.* at 248; see *id.* at 245–48.

between standards that Congress might provide under Title VII and those the Court might impose under the Fifth or Fourteenth Amendments, observing that the disparate impact inquiry “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.”<sup>101</sup> The Court worried about the potential reach of a disparate impact inquiry, which “would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”<sup>102</sup> Given the potential reach of a disparate impact inquiry, the Court reasoned, an inquiry into disparate impact was not suited for courts interpreting the judicially enforceable provisions of the Equal Protection Clause, but instead raised questions about discrimination better addressed by representative government.

The Court’s opinion in *Davis* concludes: “[I]n our view, extension of the [disparate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.”<sup>103</sup> In short, equal protection did not *require* federal courts to impose disparate impact liability directly under the Constitution, but it *permitted* Congress to make that judgment. It was for representative government to make decisions concerning racial redress and to coordinate them properly with pursuit of other aims.

The same institutionally focused justification undergirds the Court’s reasoning in *Feeney*. Only after observing that “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility,”<sup>104</sup> does *Feeney* assert that “the Fourteenth Amendment guarantees equal laws, not equal results”<sup>105</sup> and proceed to change then-familiar evidentiary presump-

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<sup>101</sup> *Id.* at 247. Justice White, the author of *Davis*, was known for a judicial philosophy that was highly deferential to Congress, as the most democratically accountable branch. See Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U. L. REV. 91, 112 (2010) (“Justice Stevens once observed, ‘Of all the Justices with whom I have served, I remember Byron [White] as the one who most consistently accorded a strong presumption of validity to the work of the Congress and the Executive.’” (alteration in original) (quoting Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003))); Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 748–49 (1998) (“Justice Byron White . . . arguably grew more conservative during his long tenure on the bench, except for his nearly parliamentary willingness to defer to the (usually Democratic) Congress.” (footnote omitted)).

<sup>102</sup> *Davis*, 426 U.S. at 248.

<sup>103</sup> *Id.*

<sup>104</sup> *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979).

<sup>105</sup> *Id.* at 273.

tions in such a way as to limit the relevance of impact evidence in proving discriminatory purpose.

The same Term the Court decided *Feeney*, it applied the discriminatory purpose cases to desegregation in *Columbus Board of Education v. Penick*,<sup>106</sup> a decision that features extended discussion of how the new discriminatory purpose framework would allow government officials to make race-conscious decisions with minimal judicial constraint. In *Penick*, Justice White, who authored *Davis*, wrote an opinion for the Court upholding the district court as having properly found evidence of intentionally segregative action in the Columbus school system.<sup>107</sup> But Justice Rehnquist, with whom Justice Powell joined dissenting, objected that the majority was not applying discriminatory purpose doctrine narrowly enough to serve the doctrine's function.<sup>108</sup> Quoting *Feeney*'s holding that "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences[;] . . . [i]t implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group,"<sup>109</sup> Justices Rehnquist and Powell urged:

The maintenance of this distinction is important: both to limit federal courts to their constitutional missions and to afford school boards the latitude to make good-faith, colorblind decisions about how best to realize legitimate educational objectives without extensive *post hoc* inquiries into whether integration would have been better served — even at the price of other educational objectives — by another decision: a different school site, a different boundary, or a different organizational structure. In a school system with racially imbalanced schools, every school board action regarding construction, pupil assignment, transportation, annexation, and temporary facilities will promote integration, aggravate segregation, or maintain segregation. Foreseeability follows from the obviousness of that proposition. *Such a tight noose on school board decisionmaking will invariably move government of a school system from the townhall to the courthouse.*<sup>110</sup>

Justice Rehnquist and Justice Powell argued that it was crucial to respect *Feeney*'s definition of discriminatory purpose in order to shift judgments about integration from federal courts to the discretion of political bodies, which should be able to make "good-faith, colorblind

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<sup>106</sup> 443 U.S. 449 (1979).

<sup>107</sup> *Id.* at 463–65.

<sup>108</sup> *See id.* at 510–11 (Rehnquist, J., dissenting).

<sup>109</sup> *Id.* at 510 (alteration in original) (quoting *Feeney*, 442 U.S. at 279) (internal quotation marks omitted).

<sup>110</sup> *Id.* (third emphasis added).

decisions” that might foreseeably or knowingly entrench racial segregation, without intrusive judicial oversight.<sup>111</sup>

Invoking the national conflict over desegregation, Justice Powell wrote separately to emphasize that most school segregation was beyond the reach of the judicially enforceable Equal Protection Clause, presenting a question for Americans to confront in politics:

Our people instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them. . . . Courts, of course, should confront discrimination wherever it is found to exist. But they should recognize limitations on judicial action inherent in our system and also the limits of effective judicial power. *The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.*<sup>112</sup>

In the 1970s, conservatives who sought to limit the role of federal courts in enforcing the Equal Protection Clause advocated deference to representative government, urging that plaintiffs redirect their claims to the legislative arena. But by the decade’s end, at least some conservatives were beginning to form a different view, searching for grounds on which to restrict the ways representative government could respond to such claims.

### *B. Limiting Civil Rights Laws: A New Role for Judicial Oversight in Equal Protection Cases?*

During the 1980s, the newly articulated constitutional distinction between purpose and effects became a lightning rod for debates about the proper reach of civil rights legislation, and a ground on which conservatives would call for limiting the ways representative government could respond to discrimination claims. In debates over antidiscrimination legislation, conservatives attacked effects standards as illegitimately redistributing opportunities on the basis of race, a wrong they increasingly associated with affirmative action.<sup>113</sup> For conservatives arguing in the legislative setting, the choice between purpose and effects standards involved questions of just distribution, not judicial deference. The arguments conservatives mobilized against legislative effects standards during the 1980s identify concerns that were beginning to reorient conservative views about the Court’s role in enforcing

<sup>111</sup> *Id.*; see *id.* at 512.

<sup>112</sup> *Id.* at 489 (Powell, J., dissenting) (emphasis added); cf. *id.* at 483–84 (“This wholesale substitution of judicial legislation for the judgments of elected officials and professional educators . . . constitutes a serious interference with the private decisions of parents as to how their children will be educated.”).

<sup>113</sup> See *infra* notes 119–122 and accompanying text; *infra* notes 127–147 and accompanying text.

equal protection, suggesting that, in addition to the familiar arguments for judicial deference, conservatives might be interested in judicial oversight of a wholly new kind.

In the 1980s, the Court's decision to apply its new discriminatory purpose standard to claims of voting discrimination in *City of Mobile v. Bolden*<sup>114</sup> provoked debates over whether to differentiate proof of discrimination under the Constitution and section 2 of the Voting Rights Act of 1965.<sup>115</sup> Those who sought to amend section 2 to reflect the "'result' or 'effect' test" of prior law<sup>116</sup> understood themselves to preserve a familiar framework for proving discrimination.<sup>117</sup> Senator Orrin Hatch joined the Reagan Administration in fiercely opposing the effort to amend section 2 as a disguised claim for "proportional representation" in electoral outcomes.<sup>118</sup>

In the legislative arena, conservatives advocated purpose-based standards of discrimination on grounds having little to do with the concerns about judicial deference that guided the equal protection decisions of the Burger Court. In talking points for the White House, then-Special Assistant to the Attorney General John Roberts urged that "[a]n effects test for § 2 could . . . lead to a *quota system* in electoral politics . . . . Just as we oppose quotas in employment and education, so too we oppose them in elections."<sup>119</sup> Critics attacked an effects standard as imposing "proportional representation," "racial balance

<sup>114</sup> 446 U.S. 55 (1980).

<sup>115</sup> 42 U.S.C. § 1973(a) (1976) (amended 1982).

<sup>116</sup> H.R. REP. NO. 97-227, at 38 (1981) (discussing "judicial history" of "'result' or 'effect' test"); see also S. REP. NO. 97-417, at 16 (1982) (stating *Bolden* "marked a radical departure"); *id.* at 19-24 (discussing cases before *Davis* and *Bolden* in which proof of intent was not required); *cf.* *Bolden*, 446 U.S. at 67 (plurality opinion) (acknowledging "dicta" in earlier opinions allowing proof of vote dilution by "disproportionate effects alone").

<sup>117</sup> H.R. REP. NO. 97-227, at 29; see also S. REP. NO. 97-417, at 2.

<sup>118</sup> S. REP. NO. 97-417, at 106; see *id.* at 132-39 (arguing the proposed standard was vague and would devolve in practice into a proportionality standard). Senator Orrin Hatch led the Committee on the Judiciary's Subcommittee on the Constitution and included in the subcommittee's report a minority report that set forth the case against the section 2 amendment. See *id.* at 107-76.

Only one dissenter appended a statement to the House Report that addressed the section 2 amendments. He proposed a "reasonably foreseeable effects" test as an alternative to the "unfettered 'results' test." H.R. REP. NO. 97-227, at 72 (dissenting views of Hon. M. Caldwell Butler).

<sup>119</sup> Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen., Talking Points for White House Meeting on Voting Rights Act (Jan. 26, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf>. For the Administration's public statements, see, for example, Robert Pear, *Justice Dept. Aide Warns Senators on Passing the Voting Rights Bill*, N.Y. TIMES, Mar. 2, 1982, at A11; and Mary Thornton, *Reagan Administration Attacked as Voting Rights Hearings Begin*, WASH. POST, Jan. 28, 1982, at A4 (quoting Attorney General William French Smith).



and racial quotas,”<sup>120</sup> and conferring “racial entitlements”<sup>121</sup> — a term borrowed from the affirmative action debates.<sup>122</sup> In these attacks on Congress’s decision to allow plaintiffs to prove discrimination under an effects standard, conservatives themselves were making arguments about entitlement and just distribution as grounds for limiting the ways representative government might redress discrimination. While unable to block section 2’s amendment,<sup>123</sup> conservatives increasingly brought concern about civil rights overreach in representative government, as well as in the courts, to judicial appointments.

In the years after the section 2 controversy, the Reagan Justice Department connected debates over intent and effects to the debate over affirmative action and treated both questions as crucial matters of concern in judicial appointments. The Justice Department created the Office of Legal Policy (OLP) to oversee selection of judicial nominees,<sup>124</sup> which, during President Reagan’s second term, was led by

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<sup>120</sup> S. REP. NO. 97-417, at 109 (“To speak of ‘discriminatory results’ is to speak purely and simply of racial balance and racial quotas.”).

<sup>121</sup> *Id.* at 140 n.120 (quoting *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 1334 (1982) [hereinafter *Voting Rights Act Hearings*] (statement of James Blumstein, Professor of Law, Vanderbilt University Law School) ); *see id.* (“[T]he proposed change [to a results standard] in Section 2 . . . implies ‘an underlying theory of some affirmative, race-based entitlements.’ . . . ‘Basically, it changes the notion from a fair shake to a fair share, a piece of the action, based upon racial entitlements, and that is what I find objectionable.” (quoting *Voting Rights Act Hearings*, *supra*, at 1332–34 (statement of James Blumstein, Professor of Law, Vanderbilt University Law School))).

<sup>122</sup> The language of racial entitlements was already part of the affirmative action debates. It appears to have been introduced in 1979 by then-Professor Antonin Scalia, *see* Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 154, and then invoked by Justice Stewart, *see* Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stewart, J., dissenting) (“Most importantly, by making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race — rather than according to merit or ability . . . . Notions of ‘racial entitlement’ will be fostered . . .”).

The comparison between voting rights and affirmative action was prominent in conservative critiques of the Act. *See* ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987).

<sup>123</sup> The amendment’s opponents did not prevail, but did shape the standard that emerged, including a proviso that the amended section 2 provided no right to proportional representation. *See* 42 U.S.C. § 1973(b) (2006) (“[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”).

<sup>124</sup> Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 880 (2005); *see also* Press Release, Dep’t of Justice, Markman New Head of OLP (1985) [hereinafter Markman New Head of OLP], available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VI\\_4/page1.htm](http://www.justice.gov/oip/foia_updates/Vol_VI_4/page1.htm); Glen Elsasser, *Bush to Drop Office that Screened Judges*, CHI. TRIB., Jan. 26, 1989, at 14 (describing the creation and operation of OLP during the Reagan presidency).

Stephen Markman, who had worked for Senator Orrin Hatch on the voting rights legislation.<sup>125</sup>

In 1987, OLP published a report that endorsed intent standards and attacked effects standards in antidiscrimination legislation.<sup>126</sup> As the OLP report argued in its executive summary, the use of effects-based standards would not rectify discrimination; instead, effects standards would alter "naturally occurring statistical disparities between groups" that otherwise "are inevitable in a heterogeneous society such as the United States" and, by doing so, lead to "the permanent institutionalization of race- and gender-conscious affirmative action."<sup>127</sup> OLP's arguments about "naturally occurring" group differences reflected views then associated with economist Thomas Sowell,<sup>128</sup> and expanded an attack on disparate impact standards that had already been advanced in the employment discrimination context by Clarence Thomas, President Reagan's chair of the Equal Employment Opportunity Commission.<sup>129</sup>

OLP tied its analysis of intent, impact, and affirmative action to the question of judicial appointments and the future of equal protection review in a document published a year later and entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpreta-*

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<sup>125</sup> On Markman's tenure, see Markman New Head of OLP, *supra* note 124. OLP was responsible for vetting potential judicial nominees, in a process that involved asking candidates questions about their views about cases of interest to the Reagan Administration. See HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 88 (1988) (reporting one candidate recalling questions about school prayer, abortion, and school desegregation cases, and another reporting Stephen Markman asking "which 'three Supreme Court decisions you would overrule if given the opportunity'"). On the screening process, see DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 102 (2d ed. 1990); YALOF, *supra* note 72, at 133-67; Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 678 (2003); and Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319-20 (1989).

<sup>126</sup> See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987) [hereinafter OLP, REDEFINING DISCRIMINATION].

<sup>127</sup> *Id.* at i.

<sup>128</sup> *Id.* at 3; see *id.* at 6 n.17 (citing THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42-43 (1984)). The OLP report repeats these claims in the language of "race" as well as "ethnic" difference. See *id.* at 14. For the influence of Sowell's views on the affirmative action cases, see *infra* note 185 and accompanying text. On Sowell's concern about affirmative action harming blacks, see RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 187, 190-91 (1996).

<sup>129</sup> In 1984, Clarence Thomas attacked then-prevailing disparate impact standards on the grounds that they relied on a presumption that statistical disparities reflected discrimination when the disparity might reflect group differences. See Robert Pear, *Changes Weighed in Federal Rules on Discrimination*, N.Y. TIMES, Dec. 3, 1984, at A1 (associating Clarence Thomas's critique of discrimination law with Thomas Sowell).

tion.<sup>130</sup> OLP published *The Constitution in the Year 2000* in 1988 — just after the defeat of Judge Robert Bork's nomination to the Supreme Court and Justice Anthony Kennedy's ensuing appointment<sup>131</sup> — for the announced purpose of guiding and mobilizing support for judicial appointments.<sup>132</sup> The document richly illustrates conservative convictions about judicial review in equal protection cases at a moment of transformation.

*The Constitution in the Year 2000* lists fifteen constitutional questions whose disposition will be shaped by a judicial nominee's "values and philosoph[y]."<sup>133</sup> The report suggests that a judge's interpretive commitments would direct him to decide cases — across a wide range of controversies — in such a way as to preserve the "original meaning" of the 1789 Constitution or to change it.<sup>134</sup> Not coincidentally, the report's choice of topics illustrated for the public how the selection of judges who would preserve the original meaning of the Constitution would matter in deciding questions concerning the "social issues" — issues such as "law and order, abortion, busing, quota systems"<sup>135</sup> — that President Reagan had for a decade employed to appeal to voters traditionally aligned with the Democratic Party.<sup>136</sup>

*The Constitution in the Year 2000* systematically associates the threat of "liberal interpretation"<sup>137</sup> with judges who interfere with democratic self-governance.<sup>138</sup> The report discusses questions of race

<sup>130</sup> OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* (1988) [hereinafter OLP, *CONSTITUTION IN THE YEAR 2000*].

<sup>131</sup> See *infra* note 398.

<sup>132</sup> See OLP, *CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at iv–v; see also Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61, 81 (2009) (recounting discussion of *The Constitution in the Year 2000* with Stephen Markman).

<sup>133</sup> OLP, *CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at v. The fifteen questions concern the rights of criminal defendants, abortion, gay rights, privacy and sexual freedom, disparate impact and affirmative action, economic rights, religious freedom, takings, executive power, federalism, immigration, and the powers of federal courts. See *id.* at i–ii.

<sup>134</sup> *Id.* at iii. The report describes differences in the judicial role in terms of debates between "strict interpretation vs. liberal interpretation or commitment to original meaning vs. commitment to an evolving constitution." *Id.* For statements of originalism in OLP publications of the period, see OFFICE OF LEGAL POLICY, U.S. DEP'T JUSTICE, *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* (1987) [hereinafter OLP, *SOURCEBOOK*]; OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *GUIDELINES ON CONSTITUTIONAL LITIGATION* 3 (1988) [hereinafter OLP, *GUIDELINES*].

<sup>135</sup> See *infra* note 164 (quoting Ronald Reagan addressing the Conservative Political Action Conference in 1977).

<sup>136</sup> For discussion of "social issues" in Ronald Reagan's strategy for realignment, with special attention to race, see *infra* note 164.

<sup>137</sup> OLP, *CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at iii.

<sup>138</sup> See, for example, the report's opening discussion of constitutional decisions concerning rights of criminal defendants, abortion, gay rights, privacy, and sexual freedom. *Id.* at 1–56.

and equal protection in this way, yet simultaneously urges something quite different: that judicial appointments are crucial to *restrict* civil rights law. Illustrating conservative claims about judicial review, equal protection, and race at a historical moment of transformation, *The Constitution in the Year 2000* argues for the importance of nominating judges who will practice restraint with reasons that instead emphasize the urgency of judicial oversight.

The report depicted the overreaching judge in new ways. After decades in which conservatives had attacked *Brown* as an overreaching decision that departed from the Framers' intentions,<sup>139</sup> the Justice Department under Attorney General Edwin Meese accepted *Brown*,<sup>140</sup> and associated the original meaning of the Equal Protection Clause with the colorblind Constitution. *The Constitution in the Year 2000* instead depicted the threat of judicial overreaching by invoking the specter of affirmative action. The report warned against judicial overreaching by asking whether in the year 2000 the Supreme Court would "define discrimination in terms of 'disparate impact' and thereby use the Equal Protection Clause to require race and gender 'affirmative action' policies."<sup>141</sup>

One could read the OLP report as warning that fresh appointments to the Supreme Court might reopen questions on which *Davis* had ruled a decade earlier, and about which the Court's critics still bitterly complained.<sup>142</sup> Given the large number of Justices that Presidents Nixon and Reagan had appointed to the Court by 1988, however, this prospect was not imminent. The report was indeed looking forward, rather than backward, reasoning about the constitutional questions at issue in *Washington v. Davis* in terms the Burger Court never did — as involving questions of racial redistribution. *The Constitution in the*

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<sup>139</sup> The *Southern Manifesto* challenged *Brown* as contrary to the Framers' intentions. See 102 CONG. REC. 4459, 4459-61 (1956). This objection was elaborated over the decades. In 1977, Professor Raoul Berger drew on Reconstruction history to publish *Government by Judiciary*, a book-length critique of *Brown* and the race jurisprudence of the Warren Court, which was commonly identified as one of the first "originalist" works. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

<sup>140</sup> See OLP, *CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at 53 (asserting that *Brown* prohibits intentional discrimination). In companion documents, OLP equates the original meaning of the Equal Protection Clause with the claim that "[o]ur Constitution is color-blind," OLP, *SOURCEBOOK*, *supra* note 134, at 46 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), in Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, and asserts that "[b]y overruling *Plessy*, *Brown* effected a return to the original meaning of the equal protection clause," OLP, *SOURCEBOOK*, *supra* note 134, at 46, without addressing or even mentioning voluminous claims to the contrary.

<sup>141</sup> OLP, *CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at i.

<sup>142</sup> See *id.* at 44 (illustrating continuing threat to intent standard by citing Professor Charles Lawrence's proposal to replace intent standard with inquiry into unconscious racism) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987)).

*Year 2000* explains the importance of appointing judges who will defer to representative government in a report that demonstrates how control over judicial appointments is necessary to entrench judicial decisions limiting affirmative action.

Even as OLP warned against the prospect of judges who might strike down the decisions of representative government, it was emphasizing the importance of appointing judges who would strike down the decisions of representative government and impose limits on affirmative action.<sup>143</sup> Within a year of *The Constitution in the Year 2000*'s publication, Justices whom President Reagan had appointed to the Supreme Court helped form the first majority to shift the burdens of proof in a disparate impact cause of action under Title VII<sup>144</sup> — a decision Congress would ultimately reverse in legislation conservatives attacked as a “quota bill”<sup>145</sup> — and the first majority to agree that strict scrutiny should be applied to affirmative action.<sup>146</sup>

## II. EXPANDING MAJORITY-PROTECTIVE EQUAL PROTECTION REVIEW

With the appointment of Justice Rehnquist as Chief Justice and the appointments of Justices O'Connor, Kennedy, and Scalia, in 1989 a majority of the Supreme Court for the first time declared affirmative action subject to strict scrutiny, and struck down a law adopted by the

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<sup>143</sup> The report argues that a Court that retreated from *Davis* “would have to reconsider its affirmative action jurisprudence,” *id.* at 47, including cases in which the Justices President Reagan appointed to the Supreme Court had recently voted to limit affirmative action. See *id.* at 48–50. In 1985, Bruce Fein, who guided judicial selection during Reagan’s first term, see SCHWARTZ, *supra* note 125, at 6, predicted that overrulings on a “Reagan Supreme Court” would give representative government greater freedom to legislate in areas such as abortion, school prayer, and criminal defendants’ rights, but singled out affirmative action as an area where a Reagan Court would be intervening in the decisions of representative government. Bruce E. Fein, *A ‘Reagan Court’ Would Overturn Past Errors*, HUM. EVENTS, July 6, 1985, at 12 (“The overrulings, however, will not necessarily effectuate any wholesale public policy changes in these areas of law, except for racial preferences.”).

<sup>144</sup> See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Writing for a plurality in a case the year before, Justice O’Connor made the case for shifting burdens of proof to plaintiffs, explaining that “the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988) (plurality opinion).

<sup>145</sup> See Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (discussing burdens of proof in disparate impact cases). On the debate, see Robin Stryker, Martha Scarpellino & Mellisa Holtzman, *Political Culture Wars 1990s Style: The Drum Beat of Quotas in Media Framing of the Civil Rights Act of 1991*, 17 RES. SOC. STRATIFICATION & MOBILITY 33 (1999).

<sup>146</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). On the affirmative action decisions of the judges President Reagan nominated to the courts of appeals, see Stephen Wermiel, *Tilting Bench: Reagan Choices Alter the Makeup and Views of the Federal Courts — Affirmative-Action Decisions Reflect Rightward Trend; Prison Terms Are Longer — An Agenda or Wise Restraint?*, WALL ST. J., Feb. 1, 1988, at 1.

City of Richmond requiring prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to minority business enterprises.<sup>147</sup> The Court presented this change in course as the vindication of principles established at the dawn of the civil rights era. As authority for extending strict scrutiny to affirmative action, Justice O'Connor cited the Court's decision in *Shelley v. Kraemer*,<sup>148</sup> much as, a decade earlier, Justice Powell's sole-authored opinion arguing for applying strict scrutiny to affirmative action in *Regents of the University of California v. Bakke*<sup>149</sup> had looked to *Brown*<sup>150</sup> and *Loving*.<sup>151</sup> From the standpoint of doctrine, the Justices argued, they were applying long-established principles, and so changed "nothing"<sup>152</sup> in applying strict scrutiny to affirmative action.

From the standpoint of history, of course, the Justices President Reagan added to the Court were forging a new body of equal protection law. The Justices President Reagan appointed engaged in responsive or "evolving" interpretation, reasoning about the meaning of civil rights precedent and principle from the standpoint of concerns shared by the Reagan Administration and constituencies it sought to represent.<sup>153</sup>

Approaching the affirmative action cases from this historical vantage point provides a perspective on modern equal protection law that diverges from the doctrinal account, identifying reasons why the Court's practices of review differ in the affirmative action and discriminatory purposes cases that concern claimants as well as claims. The earliest arguments for applying strict scrutiny to "all classifications" are concerned about harms to whites.<sup>154</sup> Early affirmative action opinions argue for strict scrutiny of affirmative action as protecting

<sup>147</sup> *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment) ("I agree . . . with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race."). The Court applied the strict scrutiny standard to affirmative action programs enacted by Congress in 1995. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

<sup>148</sup> *Croson*, 488 U.S. at 493 (plurality opinion) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

<sup>149</sup> 438 U.S. 265 (1978).

<sup>150</sup> *Id.* at 294-95 (opinion of Powell, J.) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>151</sup> *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), Chief Justice Roberts justified applying strict scrutiny to affirmative action as most faithful to *Brown*. *Id.* at 747-48 (plurality opinion).

<sup>152</sup> *Adarand*, 515 U.S. at 235 (opinion of O'Connor, J.) (arguing that "[t]here is nothing new" in applying strict scrutiny to affirmative action and citing six equal protection precedents from the era before affirmative action); see also *id.* at 223-24 (majority opinion) (employing same form of citation).

<sup>153</sup> See *infra* section II.A, pp. 31-38.

<sup>154</sup> See *infra* section II.B.1, pp. 38-44.

“whites” in ways the Court’s opinions no longer do today, when the Court explains the purpose of review in collective and universal, rather than group-conscious, terms.<sup>155</sup> Reading the affirmative action cases in historical perspective, with attention to these early justifications for strict scrutiny, further suggests how the Court’s practices of review differ in the affirmative action and discriminatory purpose cases. Early justifications for judicial oversight suggest that the Justices who first applied strict scrutiny to affirmative action acted from empathy: they fashioned a body of equal protection law that cares about the impact of state action on citizens, and about citizens’ confidence in the fairness of the state, in ways that the discriminatory purpose decisions of the Burger Court do not.<sup>156</sup>

In the end, reading the discriminatory purpose and affirmative action cases in historical perspective leads us to see a divide in equal protection case law that is deeper than standards of review. Equal protection law governing affirmative action makes the citizens’ experience of the state central in the doctrine’s structure and justifications, while discriminatory purpose doctrine is organized to exclude the citizens’ experience and perspective from constitutional consideration. These structural differences in the two branches of doctrine persist and are of immense practical consequence: they organize judicial enforcement of the Equal Protection Clause to impose different kinds of restraints on affirmative action than it imposes on the criminal law.<sup>157</sup>

#### A. *Strict Scrutiny of Affirmative Action and the Living Constitution*

Today, applying strict scrutiny to affirmative action is “black-letter law.” In the 1980s, however, the prospect represented a fundamental change in the law, an expression of the “living Constitution” dramatically at odds with conservatives’ emphatic embrace of judicial restraint and original meaning.<sup>158</sup> In 1985, Professor Eric Schnapper published *Affirmative Action and the Legislative History of the Fourteenth Amendment* to demonstrate that the case for imposing equal protection limits on affirmative action was judicial overreaching by the conservatives’ own standards.<sup>159</sup> Schnapper dryly pointed out that only Justice Marshall in *Bakke* had grounded claims about the consti-

<sup>155</sup> See *infra* section II.B.1, pp. 38–44.

<sup>156</sup> See *infra* section II.B, pp. 38–58.

<sup>157</sup> See, e.g., *infra* pp. 47–50.

<sup>158</sup> For examples of prominent conservative arguments of the period that equate originalism and judicial restraint, see Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824–27 (1986); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) [hereinafter Scalia, *Originalism*]. See also *supra* note 134 (discussing similar claims in *The Constitution in the Year 2000*).

<sup>159</sup> Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

tutionality of affirmative action in the history and original understanding of the Fourteenth Amendment.<sup>160</sup> Following Justice Marshall's lead, Schnapper amassed evidence to demonstrate the legislative history of the Fourteenth Amendment established the constitutionality of affirmative action.<sup>161</sup> Yet, neither Justice O'Connor nor Justice Scalia responded in *City of Richmond v. J.A. Croson Co.*<sup>162</sup> with an account of how the legislative history or original meaning of the Fourteenth Amendment gave the Court authority to strike down Richmond's affirmative action program — a glaring omission Justice Marshall once again emphasized in dissent.<sup>163</sup> Instead of appealing to original meaning, the Justices President Reagan appointed to the Court formed a majority to apply strict scrutiny to affirmative action in opinions that fused appeals to precedent and principle with beliefs about affirmative action that were contemporaneously expressed by the Reagan Administration and by constituencies the Administration sought to represent.

Ronald Reagan's bid for the presidency was based on his understanding that he could attract to the fold of the Republican Party Americans who historically voted with the Democratic Party but cared about what Reagan termed "social issues," prominently including "busing and quota systems."<sup>164</sup> Once in office, Reagan moved to change

<sup>160</sup> See *id.* at 753 (observing that "[w]ith one exception, this entire body of case law is devoid of any reference to the original intent of the framers of the fourteenth amendment" and pointing to Justice Marshall's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 397–98 (1978) (separate opinion of Marshall, J.), as that exception).

<sup>161</sup> *Id.* at 754. For ensuing arguments that the history of the Fourteenth Amendment supports the constitutionality of affirmative action, see CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 137–42 (2005); and Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429–32 (1997). For an "original meaning" argument for the constitutionality of affirmative action, see JACK M. BALKIN, *LIVING ORIGINALISM* 234–35 (2011).

Originalists have not responded to these arguments or developed the case against the constitutionality of affirmative action. For a recent acknowledgment of this gap within originalism and an effort to build an originalist argument against affirmative action, see Michael B. Rappaport, *Originalism and the Colorblind Constitution* 8 (San Diego Legal Studies, Paper No. 13-115, 2013), available at <http://ssrn.com/abstract=2244610>.

<sup>162</sup> 488 U.S. 469 (1989).

<sup>163</sup> *Id.* at 560 n.13 (Marshall, J., dissenting) (pointing out that appeal to the Framers' intent in Justice O'Connor's plurality opinion was devoid of relevant historical evidence).

<sup>164</sup> In campaigning for the presidency, Ronald Reagan famously appealed to "social issues" that might attract constituencies that traditionally voted with the Democratic Party, as in this 1977 speech to the American Conservative Union, which he gave during the fourth annual Conservative Political Action Conference:

[T]he so-called social issues — law and order, abortion, busing, quota systems — are usually associated with blue collar, ethnic and religious groups [that are] traditionally associated with the Democratic Party. The economic issues — inflation, deficit spending and big government — are usually associated with Republican Party members and independents . . . .

. . . The time has come to see if it is possible to present a program of action based on political principle that can attract those interested in the so-called "social" issues and



civil rights law.<sup>165</sup> Through executive branch decisions and judicial nominations, his Administration took actions responsive to Americans who protested affirmative action.<sup>166</sup> A widely covered report on “Ending Discrimination in Civil Rights,” which the Heritage Foundation published in a volume entitled *Agenda ’83*,<sup>167</sup> with authorship attribut-

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those interested in “economic” issues. In short, isn’t it possible to combine the two major segments of contemporary American conservatism into one politically effective whole?

Ronald Reagan, Governor of Cal., Address Before the American Conservative Union Banquet: Reshaping the American Political Landscape (Feb. 6, 1977), in *A TIME FOR CHOOSING: THE SPEECHES OF RONALD REAGAN, 1961–1982*, at 183–201 (Alfred A. Balitzer & Gerald M. Bonetto eds., 1983), available at [http://reagan2020.us/speeches/The\\_New\\_Republican\\_Party.asp](http://reagan2020.us/speeches/The_New_Republican_Party.asp). On Reagan’s use of social issues to realign voters, see THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 137–53 (1992). Parties do not simply reflect popular interests, but instead cultivate issues to forge new coalitions that maximize a party’s electoral advantages. See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989).

Lee Atwater, a political strategist for President Reagan, gave an anonymous interview in 1981 to political scientist Alexander Lamis in which he discussed the evolving terms in which candidates could appeal to racial resentments. It is not entirely clear whether he thought that, in changing the code for racial issues, candidates were moving beyond race or simply finding new ways of talking about race that were more acceptable in the civil rights era. See ALEXANDER P. LAMIS, *THE TWO-PARTY SOUTH* 26 (2d ed. 1990) (first printing of the anonymous interview); ALEXANDER P. LAMIS, *SOUTHERN POLITICS IN THE 1990s* 7–8 (1999) (first printing of the interview with Atwater’s name revealed). As Atwater explained:

You start out in 1954 by saying “Nigger, nigger, nigger.” By 1968 you can’t say “nigger” — that hurts you. Backfires. So you say stuff like forced busing, states’ rights, and all that stuff. You’re getting so abstract now [that] you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a by-product of them is [that] blacks get hurt worse than whites. And subconsciously maybe that is part of it. I’m not saying that. But I’m saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me — because obviously sitting around saying, “we want to cut this,” is much more abstract than even the busing thing and a hell of a lot more abstract than “Nigger, nigger.”

*Id.* at 8 (alterations in original). See generally D. SUNSHINE HILLYGUS & TODD G. SHIELDS, *THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS* 138 (2008) (on the Atwater interview); Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, *NATION* (Nov. 13, 2012), <http://www.thenation.com/article/170841/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy> (complete audio version of the interview). For more examples of racial coding, see, for example, JOSEPH A. AISTRUP, *THE SOUTHERN STRATEGY REVISITED: REPUBLICAN TOP-DOWN ADVANCEMENT IN THE SOUTH* 47–48 (1996) (describing how Reagan’s platform in 1980 emphasized “states’ rights” in the South to appeal to white southerners’ desire for local control of race relations).

<sup>165</sup> See, e.g., Howell Raines, *Reagan Sends Mixed Signals on Civil Rights*, *N.Y. TIMES*, July 16, 1981, at A1 (“Mr. Reagan is publicly reaffirming his philosophical commitment to black rights while enforcement agencies turn away from such remedies as busing, lawsuits and affirmative-action programs that the Government has used to fight racial discrimination.”).

<sup>166</sup> On protests against affirmative action in the decade preceding Reagan’s election, see DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* (2012).

<sup>167</sup> *Ending Discrimination in Civil Rights*, in HERITAGE FOUND., *A MANDATE FOR LEADERSHIP REPORT: AGENDA ’83*, at 206 (Richard N. Holwill ed., 1983). For coverage of the re-

ed to anonymous officials in the Justice Department,<sup>168</sup> observed the "racial bitterness" of "white students toward members of minority groups" aroused by affirmative action,<sup>169</sup> promised to eliminate discrimination "whether against women, blacks, minority groups, or white males";<sup>170</sup> and, to this end, announced that "[t]he top priority for legal policy in the Reagan Administration is to establish a new definition of discrimination."<sup>171</sup> Attacking effects-based measures of discrimination,<sup>172</sup> the report called for studies "to determine the extent to which affirmative action and related policies discriminating against white males are causing an increase in racial bitterness,"<sup>173</sup> and called upon the Department of Justice "to resist goals and quotas . . . [and] race-conscious solutions of any type."<sup>174</sup> The report urged the Justice Department to "mount a vigorous campaign to represent the unrepresented by seeking to reopen quotas imposed by consent decrees over the last ten to fifteen years," endorsing the principle that "[r]emedies should be limited to the actual victims of discrimination."<sup>175</sup> This principle was widely recognized as the Administration's position on affirmative action in the campaign that ensued,<sup>176</sup> and advanced by the Administration as an equal protection limit on voluntary affirmative action in *Wygant v. Jackson Board of Education*.<sup>177</sup>

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port, see, for example, *Conservatives Make Affirmative Action a Target*, N.Y. TIMES, Jan. 17, 1983, at A13. *Agenda '83* was a follow-up report to the Heritage Foundation's initial report to the Reagan Administration. See HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION (Charles L. Heatherly ed., 1981).

<sup>168</sup> On authorship of the civil rights report, see *Department of Justice, in A MANDATE FOR LEADERSHIP REPORT: AGENDA '83*, *supra* note 167, at 201.

<sup>169</sup> *Ending Discrimination in Civil Rights*, *supra* note 167, at 206.

<sup>170</sup> *Id.* at 207.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 208-09.

<sup>173</sup> *Id.* at 209.

<sup>174</sup> *Id.* at 211. See also OLP, REDEFINING DISCRIMINATION, *supra* note 126, at 19 (invoking "social Balkanization," and observing that "[i]n contemporary America, polling data suggests a 'dangerous level of resentment' in whites over the privileges that race-conscious affirmative action is seen to have bestowed on certain groups") (citing William R. Beer, *Resolute Ignorance: Social Science and Affirmative Action*, SOCIETY, May/June 1987, at 63, 66).

<sup>175</sup> *Ending Discrimination in Civil Rights*, *supra* note 167, at 212.

<sup>176</sup> On the Administration's position, see Fred Barbash, *Administration Urges Court Ban on Quotas*, WASH. POST, Dec. 3, 1983, at A4 (describing as "well-known" the Administration position that "only minority members who are the proven victims of discrimination should be given special hiring or promotion status" and suggesting that in 1983 the Administration was considering asserting it as a constitutional principle).

<sup>177</sup> 476 U.S. 267 (1986); see Brief for the United States as Amicus Curiae Supporting Petitioners at 27, *Wygant*, 476 U.S. 267 (No. 84-1340) ("[E]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 530 n.12 (1980) (Stewart, J., dissenting) (internal quotation marks omitted))). The government brief was signed by, among others, Charles Fried, Acting

It was this principle — a principle effectively prohibiting affirmative action that the Heritage Foundation and the Reagan Justice Department urged during the 1980s — that Justice Scalia asserted was required by the Equal Protection Clause in *Croson*.<sup>178</sup> In *Croson*, however, the Administration advocated the less stringent position endorsed by Justice O'Connor and three other Justices: that, upon a showing that the state had a "strong basis in evidence for its conclusion that remedial action was necessary,"<sup>179</sup> the state could "rectify the effects of identified discrimination within its jurisdiction."<sup>180</sup>

In adopting this approach, the plurality was, crucially, allowing state governments to continue remedial affirmative action programs under new, tight judicial controls. In this very important respect, the approach the plurality adopted can be understood as a compromise position that responded to fierce opposition that the Reagan Administration's efforts to end affirmative action provoked.<sup>181</sup> Yet, the plu-

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Solicitor General; William Bradford Reynolds, Assistant Attorney General; Charles Cooper, Deputy Assistant Attorney General; and Samuel A. Alito, Assistant to the Solicitor General.

<sup>178</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment) (asserting that the Equal Protection Clause limited voluntary race-conscious affirmative action to programs benefiting "identified victims of discrimination"). Justice Scalia had strongly opposed affirmative action before becoming a judge. In 1979 he published an article that attacked affirmative action as a form of "racial entitlement," but without making conventional constitutional arguments about the practice. See Scalia, *supra* note 122, at 154. The principled limit on affirmative action that Justice Scalia endorsed in *Croson* seems to reflect views of the Reagan Justice Department, to which he may well have contributed.

<sup>179</sup> *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)) (internal quotation marks omitted).

<sup>180</sup> *Id.* at 509 (plurality opinion) (emphasis added). For the Administration's position in *Croson*, see Brief for the United States as Amicus Curiae Supporting Appellee at 8–11, *Croson*, 488 U.S. 469 (No. 87–998).

<sup>181</sup> The civil rights innovations of the Reagan Administration faced unrelenting opposition. Opponents of the Administration's assault on affirmative action defeated William Bradford Reynolds's nomination to be Associate Attorney General, after Reynolds "led the Reagan administration's effort to restrict affirmative action to the proven victims of discrimination." Elsasser, *supra* note 124; see Howard Kurtz, *Civil Rights Lobby Plays Defense but Wins: Liberal Coalition Effective in Blocking Administration Initiatives*, WASH. POST, June 8, 1986, at A1; see also SEAN WILENTZ, *THE AGE OF REAGAN* 183 (2008) ("More than fifty witnesses testified before the Senate Judiciary Committee in opposition to Reynolds . . ."); WOLTERS, *supra* note 128 (discussing Reynolds's work). In an even more explosive conflict, critics of the Reagan Administration's civil rights agenda prevented Judge Robert Bork's confirmation as a Supreme Court Justice in 1987, in hearings in which Judge Bork's early opposition to civil rights legislation and to affirmative action figured prominently. See Stephen Wermeil, Gerald F. Seib & Jeffrey H. Birnbaum, *Losing Battle: How Reagan's Forces Botched the Campaign for Approval of Bork — Nominee Rejected the Advice of Keeping Low Profile; Opponents Set Strategy — Impact of Sen. Kennedy's Call*, WALL ST. J., Oct. 7, 1987, at 1 (describing opposition to Judge Bork's positions on civil rights legislation and on affirmative action and observing that "[i]t permeated into the black churches of the South and that [m]inisters were talking about it, choirs were singing about it" (quoting Sen. David Pryor) (internal quotation marks omitted)); sources cited *infra* note 398 (on confirmation fight); cf. Robert H. Bork, *The Unpersuasive Bakke Decision*, WALL ST. J., July 21, 1978, at 8 (sharply criticizing opinions in *Bakke* that allowed affirmative action).

rality subjected remedial affirmative action to sharp restrictions, which it devised a new form of strict scrutiny to implement, fashioning an approach to "strict scrutiny" that is nowhere to be found in the Warren Court precedents to which the plurality appealed.

*Croson* allowed government to engage in remedial affirmative action on the condition that government could demonstrate that a group's underrepresentation in a particular domain was likely the product of discrimination.<sup>182</sup> To find equal protection authority to limit remedial affirmative action programs in this way, the decision employed the language of narrow tailoring: Justice O'Connor objected that Richmond's "30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."<sup>183</sup> In other words, she interpreted strict scrutiny to reject the presumption that, but for discrimination, groups would be equally represented in diverse walks of life.<sup>184</sup> Though she used the language of scrutiny and narrow tailoring, Justice O'Connor was not engaging in an inquiry of the Warren Court; she was reasoning from the standpoint of civil rights critics. To justify limiting affirmative action, *Croson* devised a form of strict scrutiny based on beliefs about differences among racial and ethnic groups prominent among conservative critics of affirmative action in the 1980s.<sup>185</sup>

<sup>182</sup> *Croson*, 488 U.S. at 498–507.

<sup>183</sup> *Id.* at 507 (citing Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

<sup>184</sup> *Id.* at 507–08 ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part) (alteration in original) (internal quotation marks omitted))).

<sup>185</sup> Professor Thomas Sowell prominently questioned whether inferences of discrimination could be drawn from underrepresentation, which, he argued, often reflected cultural and other differences among racial and ethnic groups. See, e.g., THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42–48 (1984). For a prominent application of this work, see Morris B. Abram, Commentary, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1315 (1986) ("Because groups — black, white, Hispanic, male, and female — do not necessarily have the same distribution of, among other characteristics, skills, interest, motivation, and age, a fair shake system may not produce proportional representation across occupations . . . . This uneven distribution, however, is not necessarily the result of discrimination." (citing Sowell)). For the Office of Legal Policy's expression of these beliefs, see *supra* notes 126–129 and accompanying text; cf. *Ending Discrimination in Civil Rights*, *supra* note 167, at 209 (invoking Sowell for the proposition that "uneven is not necessarily inequitable" and suggesting minority choices may explain unequal representation).

Arguments against "racial balancing" reach back farther in time, to busing controversies of the 1960s and 1970s, and to debates over civil rights legislation. For discussion of balancing and busing, see, for example, *Bell v. Sch. City of Gary, Ind.*, 213 F. Supp. 819, 829 (N.D. Ind. 1963) (finding that "racial balance in our public schools is not constitutionally mandated"), *aff'd*, 324 F.2d 209 (7th Cir. 1963); and Adrienne Sepaniak, Case Note, *Bussing — A Permissible Tool of*

Justice Scalia's opinion in *Croson* voiced even more directly than Justice O'Connor's the objections of many white Americans to affirmative action. He appealed to the Constitution to prohibit, rather than limit, affirmative action,<sup>186</sup> and concluded his case for striking down Richmond's law in a warning about the "very real injustice" that "'benign' racial quotas" inflicted on "individual victims."<sup>187</sup> Quoting Justice Douglas, Justice Scalia observed:

"A DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.<sup>188</sup>

Summoning by name the individual plaintiffs in recent affirmative action cases, Justice Scalia suggested that these white men might be burned in sacrifice — or else might burn in rage. By invoking "Johnson," Justice Scalia adverted to a Title VII affirmative action case in which he also concluded his opinion by naming the plaintiff whose voice in challenging affirmative action he sought to amplify: "[T]he only losers in the process are the Johnsons of the country . . . . The irony is that these individuals — predominantly unknown, unaffluent, unorganized — suffer this injustice at the hands of a Court fond of think-

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*School Desegregation*, 49 J. URB. L. 399, 406–09 (1971). For discussion of balancing in the legislative history of Title VII, see, for example, *Sheet Metal Workers*, 478 U.S. at 452–64 (plurality opinion).

These arguments are part of constitutional law governing race-conscious admissions today. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion) ("Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society . . . ."). In recent cases, the Court has equated racial balancing with at least three distinct concepts: numbers bearing any tie to demographics, see *id.* at 729 ("Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts."); determinate numbers of any quantity, see *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) ("[T]o assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin' . . . would amount to outright racial balancing." (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.))); and consideration of race that does not serve court-sanctioned ends, see *Parents Involved*, 551 U.S. at 723 ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance.").

<sup>186</sup> See *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment); *supra* note 178 and accompanying text.

<sup>187</sup> *Croson*, 488 U.S. at 527 (Scalia, J., concurring in the judgment).

<sup>188</sup> *Id.* (citation omitted) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)).

ing itself the champion of the politically impotent.”<sup>189</sup> Justice Scalia’s determination to name the plaintiffs whose cause he sought to champion was an effort to “represent the unrepresented,” as *Agenda ’83* put it.<sup>190</sup> Justice Scalia’s strategy for representing the unrepresented may have been singular, but his open engagement with the concerns of “white” Americans who believed affirmative action unfair is a common ground for development of strict scrutiny doctrine in this period.

### *B. Comparing Discriminatory Purpose and Strict Scrutiny Doctrines*

The fact that judicial empathy for plaintiffs spurred the development of a new body of equal protection law governing affirmative action programs would be wholly unremarkable, but for the fact that, over the course of the 1970s, the Burger Court had shaped equal protection law into a body of doctrine highly deferential to the decisions of representative government. Judicial interpretation responsive to the aggrievement of white citizens threatened to divide equal protection law into two bodies of doctrine: one body of law governing minority complaints that was deferential to democratic actors, and another body of law responsive to majority complaints that closely scrutinized democratic decisionmaking.

Today, of course, doctrine explains the difference in standards of review as flowing from a difference in claims, rather than claimants. But, returning to the early cases, we find that arguments for applying strict scrutiny to “all racial classifications” are entangled in concerns about protecting “innocent” “white” citizens.<sup>191</sup> As strikingly, over time the affirmative action cases systematically efface these original group-conscious preoccupations and replace race-specific justifications for strict scrutiny with justifications emphasizing its universal and collective benefits.

Understanding the original group-conscious concerns of the affirmative action cases helps explain why the affirmative action cases diverged from the discriminatory purpose cases, and how. In justification and in structure, affirmative action cases incorporate concerns about the citizen’s experience of state action — concerns that discriminatory purpose cases are organized to exclude.

1. *Justifications for Strict Scrutiny Before and After Croson.* — In *Bakke*, Justice Powell first made the case for extending strict scrutiny

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<sup>189</sup> See *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting); *id.* (“It is unlikely that today’s result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies.”).

<sup>190</sup> See *Ending Discrimination in Civil Rights*, *supra* note 167, at 212; *supra* p. 34.

<sup>191</sup> See *infra* section II.B.1, pp. 38–44.

to affirmative action, and he advanced the argument in terms other Justices would follow, terms that would fatefully separate review of affirmative action programs from other actions of representative government. It is striking that Justice Powell invoked race at precisely the moment he repudiated a purpose-based framework for determining the constitutionality of affirmative action.

In *Bakke*, Justice Powell flatly rejected the argument that courts should defer to representative government if the government acted for proper purposes, refusing to hold that “discrimination against members of the white ‘majority’ cannot be suspect if its purpose can be characterized as ‘benign.’”<sup>192</sup> Why treat this case differently than *Washington v. Davis*? At the time of *Bakke*, the concept of “classification” did not yet count as sufficient reason to apply strict equal protection scrutiny to affirmative action. Justice Powell observed that the four other members of the Court who reached the constitutional question in *Bakke* argued that the “notion of ‘stigma’ is the crucial element in analyzing racial classifications,”<sup>193</sup> but Justice Powell disagreed. In *Bakke*, Justice Powell took thirteen pages to confront the argument that strict scrutiny “should be reserved for classifications that disadvantage ‘discrete and insular minorities’” in the *Carolene Products* sense.<sup>194</sup> Justice Powell reasoned that strict scrutiny should apply, not only to classifications that stigmatized citizens, but to “all state-imposed classifications” because of concerns about the “resentment” and “outrage” of “innocent” members of the “dominant majority”:

All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others.<sup>195</sup>

Justice Powell argued for applying strict scrutiny to “all state-imposed classifications that rearrange burdens and benefits on the basis of race” because the government’s actions “may be perceived as” deeply unfair by members of the “dominant majority,” even if the government acted for wholly benign purposes.

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<sup>192</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978) (opinion of Powell, J.).

<sup>193</sup> *Id.* at 294 n.34 (discussing *id.* at 361–62 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part)).

<sup>194</sup> *See id.* at 287–99 (rejecting the argument that strict scrutiny “should be reserved for ‘discrete and insular minorities’” (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>195</sup> *Id.* at 294 n.34.

In advancing the argument for strict scrutiny of affirmative action, it was as if Justice Powell turned *Washington v. Davis* on its head. Justice Powell illustrated his divergent responses to minority-protective and majority-protective claims for judicial review the following year in *Penick*. In *Penick*, Justice Powell joined Justice Rehnquist's dissent to emphasize that government should be able to make legitimate policy decisions with foreseeable racial disparate impact without the interference of federal courts; judges should consider the racial disparate impact of the government's action as evidence of impermissible purposes only if minority plaintiffs could demonstrate that the government acted with the specific purpose of inflicting adverse effects on them.<sup>196</sup> Justice Powell wrote separately to emphasize that "[t]he primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities."<sup>197</sup> In *Penick*, Justice Powell was prepared to defer to representative government so long as government acted from benign purposes, whereas in assessing a majority group discrimination claim in *Bakke*, Justice Powell rejected a purpose-based framework because it was insufficient to protect citizens against state action that citizens perceived as deeply inequitable.

At the time of *Bakke* and *Penick*, Justice Powell's argument for distinguishing the cases — that strict scrutiny should apply to "all state-imposed classifications" — lacked doctrinal authority as an intrinsically persuasive reason. (The following year in *Fullilove v. Klutznick*<sup>198</sup> only Justices Stewart and Rehnquist voted to apply strict scrutiny to affirmative action, and even Justice Powell voted to apply a more deferential standard of review to federal affirmative action programs, because Congress had coequal authority to enforce the Fourteenth Amendment that states lacked.<sup>199</sup>) In this period, argument about affirmative action focused on claimants, and not just claims; Justice Powell's argument in *Bakke* that strict scrutiny should apply to "all state-imposed classifications" was an argument that strict scrutiny should apply to classifications detrimental to whites, too.<sup>200</sup>

As Powell's discussion of the "white 'majority'"<sup>201</sup> in *Bakke* illustrates, the first arguments for extending heightened scrutiny to affirm-

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<sup>196</sup> See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 508–15 (1979) (Rehnquist, J., dissenting).

<sup>197</sup> *Id.* at 489 (Powell, J., dissenting); see also *supra* note 112 and accompanying text.

<sup>198</sup> 448 U.S. 448 (1980).

<sup>199</sup> In *Bakke*, Justice Rehnquist and Justice Stewart voted on statutory grounds. See *Bakke*, 438 U.S. at 417–18 (Stevens, J., concurring in part and dissenting in part). However, two years later in *Fullilove* they reached the constitutional question. Compare *Fullilove v. Klutznick*, 448 U.S. at 523–27 (Stewart, J., dissenting), with *id.* at 509–10 (Powell, J., concurring).

<sup>200</sup> See *supra* p. 39.

<sup>201</sup> *Bakke*, 438 U.S. at 294 (opinion of Powell, J.); see also *supra* p. 38.



ative action were openly engaged with the concerns of “whites”<sup>202</sup> — reasoning in racially particularized ways that diminished in *Croson*’s wake. In the years since *Croson*, the Court has tended to present strict scrutiny as a doctrine that protects all persons, whatever their racial group membership.

While the Court’s early cases justified restrictions on affirmative action in the interests of members of the majority the Court referred to as “innocent” victims of affirmative action,<sup>203</sup> over time the Court came to emphasize other constitutional reasons for restricting affirmative action, for example, the harms of stigma and stereotyping that affirmative action could inflict on minorities. Not only did strict scrutiny protect the interests of whites, Justice O’Connor emphasized in *Croson*, it also protected the interests of minorities,<sup>204</sup> and, by constraining racial conflict, served society as a whole.

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<sup>202</sup> In *Croson*, Justice Scalia also invoked the interests of “white” Americans in arguing that the Constitution prohibited affirmative action. See *supra* p. 37. Justifications focused on the claims and interests of “whites” seem to have been common in the decade between *Bakke* and *Croson*. In 1985, when the Reagan Administration argued for strict scrutiny under the Equal Protection Clause in *Wygant*, its brief repeatedly addressed “the constitutionality of measures discriminating against ‘whites.’” Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 177, at 11; see also *id.* at 10 (“[W]e see no valid justification for more lenient judicial scrutiny of laws that discriminate in favor of some minorities and against a residual category of ‘whites.’”); *id.* at 27 (discussing “whites”). In *Wygant*, Justice Powell once again defined classifications subject to strict scrutiny in racial terms, reasoning that the challenged provision “operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion). But in *Wygant*, Justices Powell and O’Connor for the most part avoided reference to “whites.” They talked about strict scrutiny in terms of “innocent” third parties. *E.g., id.* at 276 (“But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive.”); see also *id.* at 280–81; *id.* at 287 (O’Connor, J., concurring in part and concurring in the judgment). They also distinguished between two groups termed “minority” and “nonminority.” See, *e.g., id.* at 271 (plurality opinion); *id.* at 284 (O’Connor, J., concurring in part and concurring in the judgment). By the time the Administration briefed *Croson*, it also dropped reference to “whites” and distinguished between “minority” and “nonminority.” See, *e.g.*, Brief for the United States as Amicus Curiae Supporting Appellee, *supra* note 180, at 1–5, 8.

<sup>203</sup> See, *e.g., supra* note 195 and accompanying text; *supra* note 202 and accompanying text. For a reflection on the Court’s preoccupation with innocence in this period, see Kathleen M. Sullivan, *The Supreme Court, 1985 Term — Comment: Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 84–86, 94–96 (1986). The Court’s justifications for applying strict scrutiny to affirmative action so regularly discussed concerns with protecting innocent whites that the opinions inspired a large body of contemporary commentary. See, *e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990). In ensuing years, the Court largely abandoned this mode of justification. But see *infra* p. 46 (quoting later usage by Justice O’Connor).

<sup>204</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”). On the emergence of arguments concerning harm to minorities, see Jill Elaine

On this increasingly dominant account, government classification by race poses risks to social cohesion, threatening balkanization and racial conflict, and so strict judicial oversight is crucial to constrain the practice.<sup>205</sup> Strict scrutiny reflects the understanding, as Justice Kennedy has explained, that “[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”<sup>206</sup> Over time, it has become more common for the Court to explain not only the benefits of strict scrutiny but also the harms of racial classification in universal terms.<sup>207</sup> Justice Kennedy has described racial classification as demeaning and constraining all individuals, and has explained that this harm to individual dignity leads to social balkanization. As he warned in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>208</sup>: “To be forced to live under a state-mandated racial label is inconsistent with the dig-

Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1487–96 (2009).

Justice Thomas has continued to focus on harms to minorities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 364 (2003) (Thomas, J., concurring in part and dissenting in part) (discussing the “serious collateral consequences” of affirmative action plans like the University of Michigan Law School’s, such as evidence demonstrating that “heterogeneity actually impairs learning among black students”); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2430–32 (2013) (Thomas, J., concurring).

<sup>205</sup> This antibalkanization rationale was developed by the “swing” Justices who adapted the strict scrutiny framework to uphold and restrict affirmative action. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1295–303 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*]. Beginning in *Bakke*, Justice Powell emphasized that racial classifications pose a threat to social cohesion. See 438 U.S. at 298–99 (opinion of Powell, J.) (“Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”). Justice O’Connor began to discuss these themes as early as *Croson*. See *supra* note 204; see also *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . .”). Justice Kennedy regularly emphasizes that the use of racial classifications exacerbates social division. See *infra* notes 206–209. Chief Justice Roberts cited many of these opinions in *Parents Involved*. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745–46 (2007) (plurality opinion). For commentary, see Siegel, *From Colorblindness to Antibalkanization*, *supra* (distinguishing anticlassification, antisubordination, and antibalkanization approaches to affirmative action on the Court). See also Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006) (analyzing how concerns about balkanization shape the requirement of individualized consideration).

<sup>206</sup> *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); see also *id.* at 394 (warning against deference to university consideration of race in admissions because “[t]he unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid”).

<sup>207</sup> See *id.* at 341 (majority opinion) (observing that “[n]arrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group” and then discussing concerns about protecting “other innocent persons competing for the benefit” (quoting *Bakke*, 438 U.S. at 308 (opinion of Powell, J.) (internal quotation mark omitted))).

<sup>208</sup> 551 U.S. 701.

nity of individuals in our society. . . . Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness.”<sup>209</sup> Open discussion of the interests of whites and innocent third parties, so common in the earlier affirmative action cases, is now rare;<sup>210</sup> it has been abstracted and transmuted into discussion of individual dignity interests and common goods in avoiding balkanization.<sup>211</sup>

Despite their use of universalizing language, the affirmative action cases continue to reason in race-conscious ways about the concerns of majority and of minority groups. In the affirmative action cases, the Court has devised a new form of strict scrutiny that coordinates race-conscious reasons for allowing affirmative action and race-conscious reasons for restricting affirmative action.

Today, the strict scrutiny framework recognizes differences in social position among racial groups as a reason for allowing affirmative action. “[T]he very purpose of strict scrutiny is to take such ‘relevant differences into account,’” Justice O’Connor has explained.<sup>212</sup> “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”<sup>213</sup> The opinions of Justices Powell, O’Connor, and Kennedy understand concerns about social cohesion as a reason to allow, as well as to limit, race-conscious state action. In various ways, their opinions recognize that in a racially divided society, allowing government to engage in some forms of race-conscious state action may actually transform the experience of race sufficiently to promote

<sup>209</sup> *Id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy discusses the harms racial classifications pose to all individuals and to social cohesion in *Miller v. Johnson*, 515 U.S. 900 (1995), as well. *See id.* at 912.

<sup>210</sup> *But see infra* p. 46.

<sup>211</sup> Discussion of “balkanization” in the 1980s expressly associated it with white resentment. *See* sources cited *supra* note 174. This concern still shapes Court opinions, *see, e.g., infra* notes 220–229 and accompanying text, but the Justices now justify constitutional restrictions on affirmative action in terms of universal interests and common benefits. After years of criticism, the Justices have come to the view that the affirmative action decisions have more legitimacy (or persuasive authority) if the Justices emphasize the benefits that applying strict scrutiny provides to all, rather than the special protections it provides to some.

Modernization of the justifications for strict scrutiny can be understood as an instance of preservation through transformation. *See* Siegel, *Why Equal Protection No Longer Protects*, *supra* note 32, at 1113 (discussing dynamics of preservation through transformation in which “status-enforcing state action evolves in form as it is contested”).

<sup>212</sup> *Grutter*, 539 U.S. at 334 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (internal quotation marks omitted)); *see also id.* at 327 (discussing strict scrutiny as considering “relevant differences” (quoting *Adarand*, 515 U.S. at 228 (internal quotation marks omitted))).

<sup>213</sup> *Adarand*, 515 U.S. at 237.

social cohesion.<sup>214</sup> This kind of reasoning informs Justice Powell's original justification for allowing affirmative action to achieve diversity in the university setting, as well as the more wide-ranging justification for diversity Justice O'Connor offered in *Grutter*.<sup>215</sup>

In the process, the Justices who have voted to uphold affirmative action subject to close judicial oversight have transformed strict scrutiny. The justifications Justices Powell, O'Connor, and Kennedy offer for strict scrutiny are reasons for imposing "constitutional constraints" on the way government pursues its legitimate and "compelling" purposes.<sup>216</sup> Even if government has compelling reasons to take race into account to promote diversity in education<sup>217</sup> and to promote equal opportunity and end racial isolation,<sup>218</sup> Justice Kennedy is insistent that courts oversee the means by which government pursues these ends<sup>219</sup> because of the many harms that racial classifications inflict on all citizens and society as a whole.

2. *How Discriminatory Purpose and Affirmative Action Cases Diverge.* — Understanding that modern discriminatory purpose and strict scrutiny law were forged in the desegregation and affirmative action debates of the late twentieth century helps explain not only why, but also *how* these two bodies of law diverge. Judges who began to apply strict scrutiny to affirmative action acted in response to citizen objec-

<sup>214</sup> See Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205, at 1300–08.

<sup>215</sup> See *id.* at 1298–99; see also *Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) ("[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

<sup>216</sup> *Adarand*, 515 U.S. at 237; see *Grutter*, 539 U.S. at 333 ("Even . . . when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end . . .'" (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996))). For an argument that *Adarand* transforms strict scrutiny from an inquiry into suspect purposes into a cost-benefit analysis, see Rubinfeld, *supra* note 161, at 436–43. On strict scrutiny as a constraint on means, see *infra* notes 222–225 and accompanying text.

<sup>217</sup> On diversity in higher education, see *Grutter*, 539 U.S. at 387–88, 395 (Kennedy, J., dissenting); on diversity in primary and secondary education, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>218</sup> *Parents Involved*, 551 U.S. at 787–90, 797–98 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>219</sup> See *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) ("In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued."); see also *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419–20 (2013) ("Once the University has established that its goal of diversity is consistent with strict scrutiny . . . [t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

tions that the programs were unfair. The body of strict scrutiny doctrine that emerged is, unlike discriminatory purpose doctrine, deeply attuned to the citizen's experience of state action.

The justifications for strict scrutiny in affirmative action cases no longer emphasize the importance of protecting innocent victims of affirmative action, yet they remain intently focused on the beliefs about race that citizens internalize in their interactions with the state.<sup>220</sup> Attention to citizens' experience of government action not only figures centrally in the justifications for strict scrutiny, but also shapes the body of law the Court has developed to govern affirmative action.<sup>221</sup> In this area of equal protection law, it does not suffice for government to demonstrate that it acts from benign, or even compelling, purposes; as the Court recognized compelling reasons for state consideration of race, it has transformed strict scrutiny into a constraint on the means by which the government pursues those ends.<sup>222</sup>

In the process the Court has devised a new body of strict scrutiny law designed to constrain the means by which government promotes diversity or pursues remedial ends that is focused on protecting expectations of fair dealing that citizens have in interacting with the government. These concerns shape not only the quantitative limits the decisions impose on affirmative action,<sup>223</sup> but also the requirements the decisions impose on affirmative action's form. Thus, after Justice Powell recognized diversity as a compelling government interest in *Bakke*, he allowed universities to consider the race of applicants as a "plus," but not to separate the admissions process by race.<sup>224</sup> Even if there was a constitutional reason to allow government to consider race, the Constitution constrained the form in which government could do

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<sup>220</sup> See, e.g., *supra* notes 205–209 and accompanying text.

<sup>221</sup> For example, the Court's efforts to make constitutional law responsive to citizens' concerns about the fairness of affirmative action have shaped the Court's judgments about standing in these cases. To demonstrate injury in fact for standing purposes, a plaintiff challenging an affirmative action program need not show that she would have gotten a benefit had government not considered race; she need only show that government considered race in the way it organized the opportunity to compete for the benefit. See *Adarand*, 515 U.S. at 211 (citing *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (opinion of Powell, J.). Showing injury in fact does not require demonstrating the wrongful distribution of a good, but focuses instead on the meanings generated as government interacts with citizens.

<sup>222</sup> See *Parents Involved*, 551 U.S. at 743 (plurality opinion) ("Our established strict scrutiny test for racial classifications, however, insists on 'detailed examination, both as to ends *and* as to means.'" (quoting *Adarand*, 515 U.S. at 236 (emphasis added))); see also *Fisher*, 133 S. Ct. at 2419–20; sources cited *supra* notes 216 and 219 (discussing additional examples).

<sup>223</sup> See *supra* p. 36.

<sup>224</sup> *Bakke*, 438 U.S. at 316–18 (opinion of Powell, J.).

so. Citizens would view separate admissions as unfair, Justice Powell reasoned, and, under the Constitution, "appearance" — that is, how citizens perceive government action — matters:

Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice."<sup>225</sup>

In *Grutter*, Justice O'Connor affirmed and elaborated upon Justice Powell's requirement of individualized consideration. She began her discussion of the individualized consideration requirement by describing narrow tailoring as probing for suspect motives,<sup>226</sup> but concluded her discussion by explaining the function of narrow tailoring on completely different grounds, as protecting citizens who might be adversely affected by the government's pursuit of legitimate ends. Narrow tailoring was no longer about smoking out government's bad motives but served a very different function: protecting "innocent persons" from harm ("members of any racial group," but especially those "individuals who are not members of the favored racial and ethnic groups"<sup>227</sup>) when government is pursuing important public ends. In *Grutter*, Justice Kennedy also emphasized that safeguarding the confidence of prospective students in the fairness of the application process was a crucial reason for "[c]onstant and rigorous judicial review" of the means by which schools promote diversity<sup>228</sup>: "Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation."<sup>229</sup>

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<sup>225</sup> *Id.* at 319 n.53 (alteration in original) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *cf. supra* p. 39 (considering citizen perceptions of affirmative action). Reasoning in this same tradition, Justice O'Connor has warned that government may have a compelling reason to consider race in voting districting, but not if racial considerations predominate in ways that are legible to the citizenry: "appearances do matter." *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

<sup>226</sup> *Grutter*, 539 U.S. at 333 ("The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion))).

<sup>227</sup> *Id.* at 341 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)) (internal quotation mark omitted).

<sup>228</sup> *Id.* at 393 (Kennedy, J., dissenting).

<sup>229</sup> *Id.* at 394.

Outside strict scrutiny law, equal protection standards of review allow government to act without any similar constraints. *Davis* and *Feeney* overturned lines of cases that looked to government's actions in the world to judge the constitutionality of the government's conduct; *Davis* and *Feeney* replaced doctrine that held government to account for the foreseeable racial consequences of its actions with a body of law that defined the constitutionality of government's conduct solely by reference to the purity of its purposes. In contrast to strict scrutiny's focus on the messages and meanings engendered by state action, discriminatory purpose doctrine invites judges to evaluate government action by something like the doctrine of double effect.<sup>230</sup> Government may act in ways it foresees will disparately impact minority communities and engender divisive racial meanings, so long as government can show it is acting in the service of a legitimate purpose rather than an illegitimate one. Discriminatory purpose doctrine imposes no constraints on the means by which government pursues legitimate and compelling ends.<sup>231</sup> The proportionality of the government's ends and means is not constitutionally relevant, except insofar as one could argue that the impact of the government's actions is so extreme it can only reasonably be construed as evidence of a malicious purpose to harm the adversely affected group.<sup>232</sup>

Because it is extremely difficult to prove discriminatory purpose and nearly always possible to find some reason for a government policy with a racial disparate impact other than a purpose to harm the group, the *Davis-Feeney* framework allows courts to immunize most government action against equal protection challenge. This is one important reason why equal protection law has played so little role in interrogating the spectacular increase in incarceration that began in the

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<sup>230</sup> For a formulation of the doctrine of double effect, see SHELLY KAGAN, *NORMATIVE ETHICS* 103 (1998) ("[I]t may be permissible to perform an act with both a good effect and a bad effect, provided that the bad effect is a mere side effect; if it is either your goal or a means to your goal, the act is forbidden."). Observe that the doctrine of double effect claims only that actions which foreseeably cause harm *may* be permissible if done for a legitimate purpose.

<sup>231</sup> In *Feeney*, for example, the lower court initially invalidated the veterans preference because there were alternate means of achieving the government's purposes that had less exclusionary impact, but abandoned that rationale after the Court decided *Davis*. See *supra* note 82 and accompanying text. The lower court then pointed to the foreseeable impact of the preference as evidence of its unconstitutional purpose — the precise ground on which the Court reversed on appeal. See *supra* pp. 18–19.

<sup>232</sup> Cf. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 277 n.23 (1979) ("This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact . . . would not be any more or less 'neutral' in the constitutional sense.").

period in which discriminatory purpose doctrine was born,<sup>233</sup> despite incarceration's devastating impact on communities of color.<sup>234</sup>

Government regularly uses race in apprehending suspects, but the race-based descriptions and the race-based searches have not triggered strict scrutiny as racial classifications<sup>235</sup> — a term the Court has never

<sup>233</sup> State incarceration rates have increased by 700 percent since the early 1970s. THE PEW CTR. ON THE STATES, PRISON COUNT 2010, at 1 (2010), available at <http://www.pewstates.org/research/reports/prison-count-2010-85899372907> ("Starting in 1973 . . . the prison population and imprisonment rates began to rise precipitously . . . [and] in the four decades since, the number of prisoners [in state custody] grew by 705 percent." (citing PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 15 (1988))); Rebecca Ruiz, *Eyes on the Prize: Our Moral and Ethical Duty to End Mass Incarceration*, AM. PROSPECT (Dec. 6, 2010), <http://prospect.org/article/eyes-prize> ("Between 1972 and 2008, the . . . inmate population [for all state prisons] grew 708 percent."). With federal incarceration included, growth over the past thirty years is 500 percent. *Incarceration*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Sept. 29, 2013).

<sup>234</sup> For discussion of racially disparate rates of incarceration and their possible causes, see E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (discussing the United States prisoner population in 2011 and noting that "[i]n 2011, blacks and Hispanics were imprisoned at higher rates than whites in all age groups for both male and female inmates [in state and federal correctional facilities]," and that "[a]mong prisoners ages 18 to 19, black males were imprisoned at more than 9 times the rate of white males" and "Hispanic males were imprisoned at 2 to 3 times the rate of white males in 2011"); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011) (discussing factors such as profiling and selective prosecution that can contribute to racially disparate rates of incarceration, and projecting that "[i]f current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males[. . .] [f]or women, the overall figures are considerably lower, but the racial/ethnic disparities are similar: 1 of every 18 African American females, 1 of every 45 Hispanic females, and 1 of every 111 White females can expect to spend time in prison").

There is a massive literature on the "racial dimension of mass incarceration." ALEXANDER, *supra* note 27, at 6; see *id.* at 6–7; see also Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 173, 179 & n.27, 229 (2008) (observing that "recent experiments have shown that among persons of color, especially those who are poor or reside in poor neighborhoods, harsher punishment has produced iatrogenic or counterdeterrent effects," *id.* at 173).

<sup>235</sup> For one of the only sustained judicial debates on the question of whether the use of race in suspect apprehension is a racial classification within the meaning of the Court's strict scrutiny cases, see *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000); and *infra* note 238 and accompanying text. Usually discussion, if any at all, is more cursory. See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380, 389 (4th Cir. 2009) (explaining that although police stopped 190 black males and asked them for DNA samples, the police search for a serial rapist "did not stem from an explicit government [racial] classification, at least for purposes of equal protection jurisprudence"). For two recent decisions that break with standard practice, see *infra* pp. 64–67. For discussion in the literature, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163; R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1108–21 (2001); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 243 (1983); and Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205, at 1361–62.



once defined.<sup>236</sup> In a case where a citizen reported an assault by a man she thought was black and police questioned every black male student at a local state school, along with some two hundred other minority men,<sup>237</sup> the Second Circuit's view that the government had "legitimate" purposes in differentiating among citizens by race settled the question whether law enforcement had employed a racial classification subject to strict scrutiny,<sup>238</sup> and decided the question of discriminatory purpose.<sup>239</sup> The court characterized minority students' experience of denigration and inequity in being singled out by the police<sup>240</sup> as a racial "disparate impact"<sup>241</sup> and a problem of "community relations,"<sup>242</sup>

<sup>236</sup> For other commentators observing that equal protection law does not provide clear principles that operate across contexts to determine what counts as a racial classification that triggers strict scrutiny, see Pamela S. Karlan, Lecture, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1581–86 (2002) (arguing that redistricting and affirmative action cases together show that "racial classification" is a term of art," *id.* at 1581); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509 (2003) ("[C]ourts often decide whether to apply strict scrutiny based on a normative sense that a statute is constitutionally problematic and then, reasoning backwards, announce that something in the statute constitutes an express classification.").

<sup>237</sup> *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000).

<sup>238</sup> The court observed:

They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. . . . In acting on the description provided by the victim of the assault — a description that included race as one of several elements — defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.

*Id.* at 337–38. The question of whether the classification is solely on the basis of race is not germane in the affirmative action context, where government considers race as one of multiple factors in making admissions decisions. For equal protection analysis of the use of race in suspect apprehension, see sources cited *supra* note 235.

<sup>239</sup> *Brown*, 221 F.3d at 338–39.

<sup>240</sup> In addition to bringing suit, the minority community spoke out against the Oneonta police action. See, e.g., Jim Mulvaney, *College Dragnet for Black Blasted*, NEWSDAY, Sept. 12, 1992, at 5 ("They came to my dorm, asked me where I was the night before and demanded to see my hands," said Dan Sontag, 22, a junior from Scotia majoring in business. "I was scared, but I just figured it was a simple mistake . . . . It wasn't until later I learned it was every black male that I got furious.") (alteration in original); *id.* ("It is very discouraging to live in an environment where you can be harassed like that," said Clement Mallory, 22, a political science student from Park Slope, Brooklyn, who also was questioned. "You don't see them questioning every white man every time somebody commits a crime.").

<sup>241</sup> *Brown*, 221 F.3d at 338.

<sup>242</sup> The Second Circuit acknowledged that the "actions of the police were understandably upsetting to the innocent plaintiffs who were stopped," *id.* at 339, but then distinguished the "community relations" question from the constitutional question:

We are also not unmindful of the impact of this police action on community relations. Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness. . . . Yet our role is not to evaluate whether the police action in question was the appropriate

both of which the court took pains to emphasize were irrelevant to the constitutional question.

Equal protection doctrine governing affirmative action worries about the racial meaning and impact of state action even when the government has compelling purposes; but the *Feeney* framework makes the impact of state action on adversely affected communities immaterial unless the plaintiffs can show that the government acted, at least in part, for the purpose of inflicting the adverse impact on them.<sup>243</sup> When the Supreme Court was asked to rule on a race discrimination challenge to the death penalty, the Court invoked *Feeney*.<sup>244</sup> When asked to rule on the constitutionality of federal sentencing guidelines that imposed a 100:1 ratio in penalties for crack compared to powder cocaine, courts repeatedly invoked *Feeney*.<sup>245</sup> When asked to rule on the disfranchisement of felons, the Second Circuit invoked *Feeney*.<sup>246</sup> *Feeney* is not only applied to restrict challenges to laws of general application. It also shapes the doctrine of selective enforcement,<sup>247</sup> increasing the burden on plaintiffs seeking to

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response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.

*Id.*

<sup>243</sup> See *supra* section I.A.2, pp. 15–20.

<sup>244</sup> *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (“For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.” (citing *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979))).

<sup>245</sup> See *United States v. Moore*, 644 F.3d 553, 557–58 (7th Cir. 2011) (finding no discriminatory intent under *Feeney* and upholding guideline disparity under rational basis review); *United States v. Clary*, 34 F.3d 709, 713 (8th Cir. 1994) (reversing a district court which had found that racial reasoning informed adoption of sentencing guidelines and upholding the guidelines, citing *Feeney* multiple times); cf. *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring) (suggesting circumstances in which it might be possible to find discriminatory purpose under *Feeney*). For two district court decisions protesting the ways discriminatory purpose doctrine has been employed to uphold the 100:1 ratio in the guidelines, see *United States v. Bannister*, 786 F. Supp. 2d 617, 666–67 (E.D.N.Y. 2011); and *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), *rev’d*, 34 F.3d 709. And in a recent case about the retroactivity of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.), which reduced the sentencing ratio from 100:1 to 18:1, the Sixth Circuit held that *Feeney* did not preclude a finding that the retroactive application of the 100:1 guideline was intentionally discriminatory. See *United States v. Blewett*, 719 F.3d 482, 489 (6th Cir. 2013) (“There is overwhelming and unavoidable proof that the continued application of the old crack law keeps blacks in jail at a discriminatory rate. This proof supports an inference that the old crack laws have been maintained at least in part because of their discriminatory effects.”), *vacated and reh’g en banc granted*, *id.* at 482 (July 11, 2013). At the time of writing, this decision was vacated pending en banc review.

<sup>246</sup> See *Hayden v. Paterson*, 594 F.3d 150, 164 (2d Cir. 2010).

<sup>247</sup> See *Wayte v. United States*, 470 U.S. 598, 610 (1985) (citing *Feeney*, 442 U.S. at 279, and holding that “[e]ven if the passive [prosecution] policy had a discriminatory effect, petitioner has not shown that the Government intended such a result”).

show bias in the enforcement of laws, even where their racial disparate impact is dramatic.<sup>248</sup>

3. *Ricci: A Double Standard for Discriminatory Purpose Law?* — The special solicitude accorded majority claimants in affirmative action law may be beginning to reshape discriminatory purpose law. In *Ricci v. DeStefano*,<sup>249</sup> the Roberts Court encouraged discriminatory purpose challenges to federal employment discrimination law that rely on inferences of discriminatory purpose that courts have rejected when minority claimants challenge the criminal law.

In *Ricci*, the Court considered claims that the disparate impact provision of federal employment discrimination law might violate the Equal Protection Clause. That the Court even considered the claim represents a striking historical development. In the 1970s, as we have seen, many federal judges thought equal protection required inquiry into the racial disparate impact of government action.<sup>250</sup> Eight federal circuit courts thought a *Griggs*-like inquiry into disparate impact the appropriate framework for evaluating equal protection employment discrimination claims in the public sector.<sup>251</sup> In *Washington v. Davis*, the Supreme Court reversed judgments of this kind and held that the disparate impact inquiry was not required, but permitted by the Equal Protection Clause, deferring to Congress as the democratic actor best situated to make decisions whether to enact legislation imposing disparate impact liability.<sup>252</sup> Today, the Roberts Court is entertaining the question whether to interpret the Equal Protection Clause to prohibit Congress from enacting civil rights legislation that imposes disparate impact liability under certain circumstances.

For another measure of how dramatically equal protection law has changed, recall that President Reagan's Justice Department warned against the appointment of overreaching liberal judges in *The Constitution in the Year 2000* by asking whether by 2000 the Supreme Court would "define discrimination in terms of 'disparate impact.'"<sup>253</sup> But the Court has not reinstated minority-protective oversight of this kind. Instead, it is expanding majority-protective oversight. Justices Kennedy and Scalia wrote opinions in *Ricci* suggesting that the Equal

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<sup>248</sup> See *United States v. Armstrong*, 517 U.S. 456, 458–71 (1996) (holding that in order to obtain discovery for a selective prosecution claim, a claimant must initially present "a credible showing of different treatment of similarly situated persons," *id.* at 470, and that once the claimant makes an initial showing, then — potentially with the help of discovery — he must "demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose,'" *id.* at 465 (quoting *Wayte*, 470 U.S. at 608 (citing *Feeney*, 442 U.S. 256))).

<sup>249</sup> 129 S. Ct. 2568 (2009).

<sup>250</sup> See *supra* section I.A.1, pp. 12–15.

<sup>251</sup> See *supra* notes 62–65 and accompanying text.

<sup>252</sup> See *Washington v. Davis*, 426 U.S. 229, 248 (1976); *supra* p. 21.

<sup>253</sup> OLP, CONSTITUTION IN THE YEAR 2000, *supra* note 130, at i.

Protection Clause restricts, and might even prohibit, a civil rights law that allows employees to challenge employment practices with racial disparate impact. The five Justices who voted in *Ricci* to raise constitutional questions about the disparate impact claim were either appointed by, or worked in the Administration of, President Ronald Reagan.<sup>254</sup>

The law that was at issue in *Ricci* is a provision of the federal employment discrimination statute that allows employees to challenge facially neutral employment criteria that have a disparate racial impact.<sup>255</sup> The employment practices the disparate impact claim enables employees to challenge may have been adopted because of covert bad purpose, unconscious bias, or structural bias;<sup>256</sup> for these and other reasons, an employer's use of the exclusionary criteria may divide the workforce in ways that many workers perceive to be unfair.<sup>257</sup> Yet even if plaintiffs show that an employment practice has a racial disparate impact, an employer will prevail if the employer can show that it has legitimate business reasons for using the challenged practice.<sup>258</sup>

Bias of different kinds could well have been at play in *Ricci*, which was but one chapter of a long-running conflict. White and minority firefighters in New Haven, Connecticut, had been litigating for decades about minority access to employment,<sup>259</sup> and the union and the City had fixed by contract the weight the City would give to written and oral exams in employment decisions.<sup>260</sup> When New Haven announced that results of a written exam would lead to promotion of virtually all white officers,<sup>261</sup> the minority firefighters pressed back in mistrust, claiming disparate impact; the City then announced it would

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<sup>254</sup> Justice Kennedy and Justice Scalia were nominated to the Supreme Court by President Reagan. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 29, 2013). During President Reagan's presidency, Chief Justice John Roberts served as Special Assistant to the Attorney General and as Associate Counsel to the President, and Justice Alito served as Assistant to the Solicitor General and Deputy Assistant to the Attorney General. *Id.* President Reagan named Justice Thomas Chairman of the U.S. Equal Employment Opportunity Commission, a position that Justice Thomas held for the remainder of Reagan's presidency. *Clarence Thomas*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/bios/clarence.html> (last visited Sept. 29, 2013).

<sup>255</sup> Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (codifying *Griggs*).

<sup>256</sup> *Primus*, *supra* note 236, at 518–36 (discussing possible doctrinal purposes of disparate impact law).

<sup>257</sup> See Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205, at 1340–42.

<sup>258</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

<sup>259</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting); see also Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205, at 1324–25, 1338–40.

<sup>260</sup> *Ricci*, 129 S. Ct. at 2679.

<sup>261</sup> *Id.*

adopt a new test and retest applicants for promotion.<sup>262</sup> White fire-fighters filed suit under the Constitution and the statute, and persuaded the Supreme Court that the City's decision violated the law.

Writing for the Court, Justice Kennedy held that, in retesting applicants for promotion, the City had engaged in disparate treatment in violation of Title VII.<sup>263</sup> The majority announced it was avoiding the constitutional question, yet analyzed the City's decision to retest applicants as if it presented an unresolved equal protection question. Invoking 1980s debates about disparate impact and "quotas" (which then concerned the allocation of burdens of proof under Title VII, *not* equal protection),<sup>264</sup> the majority announced a new test expressly drawn from *Croson* and *Wygant* (an early affirmative action case): the Court required employers to show that their concerns about disparate impact had a "strong basis in evidence" before changing employment criteria on which applicants might have relied.<sup>265</sup> The Court further announced that it was not holding "that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a fu-

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<sup>262</sup> *Id.* at 2664–65; *see also id.* at 2690–97 (Ginsburg, J., dissenting); Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205, at 1315–23.

<sup>263</sup> *Ricci*, 129 S. Ct. at 2664, 2673.

<sup>264</sup> *Id.* at 2675 (suggesting that constraints on disparate impact are needed or it "would amount to a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures'" and "[e]ven worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance" (omission in original) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion))). Justice O'Connor authored *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, a year before *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). When Congress moved to reinstate the burdens of proof in disparate impact law after *Wards Cove*, the legislation was opposed as a quota bill. *See supra* notes 144–145 and accompanying text. For associations between effects standards and affirmative action during the Reagan administration, *see supra* section I.B, pp. 23–29.

During this period, the attack on disparate impact as a "quota" was not understood to state an equal protection claim. *See Siegel, From Colorblindness to Antibalkanization*, *supra* note 205, at 1323 n.136.

<sup>265</sup> *Ricci*, 129 S. Ct. at 2675 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)) (internal quotation marks omitted). Justice Kennedy's opinion focused on concerns raised by an employer's decision to retest employees for publicly announced racial reasons. *See Siegel, From Colorblindness to Antibalkanization*, *supra* note 205, at 1331 & nn.151–52 ("Passage after passage of *Ricci* focus[ed] on the City's decision to invalidate the test it had already administered . . ."). *Id.* at 1331. Courts today are still working to identify the circumstances in which employers must satisfy *Ricci*'s "strong basis in evidence" test before modifying practices with racial disparate impact, particularly given Justice Kennedy's affirmation that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." *Ricci*, 129 S. Ct. at 2677; *see, e.g., Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 96 (2d Cir. 2013) (holding for the City without requiring it to pass the "strong basis in evidence" test); *United States v. Brennan*, 650 F.3d 65, 124 (2d Cir. 2011) (requiring the City to pass the "strong basis in evidence" test).

ture case.”<sup>266</sup> These aspects of the *Ricci* decision point to the majority’s engagement with an equal protection claim that its opinion does not fully address. What might that claim have been? The firefighters’ exam at issue in *Ricci* did not involve racial classifications. Given that the exam was the same for all applicants and no individual applicant was singled out for affirmative action for promotion, the majority seems to have been considering New Haven’s liability for discriminatory purpose when the Court recognized the plaintiffs’ statutory disparate treatment claim.

But on what grounds would the majority find discriminatory purpose in this case? Justice Kennedy’s opinion seemed to accept that New Haven’s decision to retest applicants was an effort to comply with Title VII or to avoid litigation. *Feeney* establishes that the City was entitled to pursue these legitimate ends, even if they had a foreseeable racial disparate impact. The majority did not suggest that the City’s reasons were an alibi covering animus toward the white firefighters,<sup>267</sup> or otherwise point to evidence showing that the City decided to retest applicants “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects”<sup>268</sup> on them. Rather, Justice Kennedy simply ignored *Davis* and *Feeney*, and worried about the impact of the government’s action on citizens, *despite* the City’s legitimate purposes. The majority addressed the white firefighters’ discriminatory purpose claim as if the claim were governed by affirmative action law:

Examinations like those administered by the City *create legitimate expectations on the part of those* who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system *that safeguards against the very racial animosities Title VII was intended to prevent*.<sup>269</sup>

Without suggesting that New Haven had acted for reasons amounting to a discriminatory purpose within the meaning of *Davis* and *Feeney*, the majority found disparate treatment under Title VII,<sup>270</sup> but then imposed restrictions on retesting that derived from the Court’s affirmative action decisions.<sup>271</sup> It is in its affirmative action cases, and *not* in its discriminatory purpose cases, that the Court is concerned about the impact and social meaning of state action, that the Court protects the expectations of job applicants, and that the Court prevents

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<sup>266</sup> *Ricci*, 129 S. Ct. at 2676.

<sup>267</sup> Justice Alito suggested something like hostility of this kind was at work in the decision. *See id.* at 2683–89 (Alito, J., concurring).

<sup>268</sup> *Pers. Adm’t v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>269</sup> *Ricci*, 129 S. Ct. at 2676 (emphasis added).

<sup>270</sup> *Id.* at 2664, 2673.

<sup>271</sup> *See supra* p. 53.

citizen interactions with government that might lead to racial division. In *Ricci*, the majority invoked equal protection to reinterpret Title VII, extending forms of protection to white discriminatory purpose claimants that the Court has not extended to minority discriminatory purpose claimants.

Justice Scalia wrote separately in *Ricci* to encourage plaintiffs to bring equal protection cases challenging disparate impact law.<sup>272</sup> Resolution of *Ricci* on statutory grounds, he wrote, “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”<sup>273</sup> Justice Scalia warned of the coming “war between disparate impact and equal protection”<sup>274</sup> and asserted:

Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. See . . . *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 . . . (1979).

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. . . . Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. . . . And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 . . . (1995).<sup>275</sup>

In this passage, Justice Scalia depicted disparate impact law as a preference lacking in meritocratic aims (“racial thumb on the scales”), which takes from the racially deserving and gives to the racially undeserving. The argument is both old and new. In *Ricci*, Justice Scalia presented conservatives’ three-decades-old “war” on disparate impact,<sup>276</sup> now expressed in constitutional form, as a claim that disparate impact violates equal protection.

Justice Scalia argued that in enacting disparate impact law, Congress pressured employers to give preferences to minority employees in ways that violate *Feeney*. But he offered no evidence to establish a violation of *Feeney* in the ordinary sense. Acknowledging in passing that disparate impact law might encourage employers to rectify bias in

<sup>272</sup> See *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring).

<sup>273</sup> *Id.* at 2682.

<sup>274</sup> *Id.* at 2683.

<sup>275</sup> *Id.* at 2682.

<sup>276</sup> See *supra* section I.B, pp. 23–29.

their hiring criteria, Justice Scalia asserted, without argument, that government can only remedy employers' intentional discrimination and has no constitutional prerogative to combat the forms of unconscious and structural bias disparate impact is most commonly invoked to correct.<sup>277</sup> But even if one decided that by enacting the disparate impact law, Congress exceeded the scope of its power to remedy discrimination, a determination of this kind would not demonstrate that Congress acted with discriminatory purpose within the meaning of *Feeney*. At no point did Justice Scalia suggest that Congress enacted the disparate impact law with a purpose to inflict adverse impact on whites. Rather, as if to acknowledge that he had not established anything resembling *Feeney*'s required showing of malice or specific purpose to inflict adverse effects on whites, Justice Scalia invoked *Adarand Constructors, Inc. v. Peña*<sup>278</sup> and the affirmative action cases for the proposition that benign purposes (here Congress's concern to remedy and deter race discrimination) should not immunize a statute against equal protection challenge. Of course, under *Feeney*, putatively benign motives *do* immunize statutes of general applicability against equal protection challenge.

Justice Scalia expressly revised discriminatory purpose law as Justice Kennedy implicitly did, by running together the reasoning of the affirmative action and discriminatory purpose cases. Justice Scalia contemplated finding discriminatory purpose as Justice Kennedy did, by suggesting that facially neutral state action that inflicts adverse effects on citizens could violate equal protection, even if the government acted for benign purposes. By rewriting *Feeney* to relieve plaintiffs of the burden of demonstrating that the government took the challenged action at least in part to inflict adverse effects on them, Justice Scalia raised constitutional questions about other race-conscious facially neutral efforts to rectify bias, to increase diversity, or to integrate. As one post-*Ricci* article succinctly queries, "Is Integration a Discriminatory

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<sup>277</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) ("It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination — to 'smoke out,' as it were, disparate treatment. . . . But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion . . .").

In this brief passage, Justice Scalia suggested that disparate impact might be constitutional to the extent that it corrects intentional discrimination, but unconstitutional to the extent that it goes beyond that aim to correct unconscious or structural bias. He offered no argument or authority in support of this claim. Justice Scalia appears to be transporting the framework of *Washington v. Davis* to this context. But as we have seen, *Davis* states a limit on the judicially enforceable Constitution relating to the institutional limits of courts. It does not purport to limit Congress's capacity to remedy racial discrimination. To the contrary, Justice White expressly stated in *Davis* that Congress can impose disparate impact liability where the Court will not. See *supra* notes 101–103 and accompanying text.

<sup>278</sup> 515 U.S. 200 (1995).



Purpose?”<sup>279</sup> What of the Court’s own narrow tailoring requirement in affirmative action cases, which requires employers to pursue diversity by facially neutral means before adopting individual affirmative action?<sup>280</sup> Percent plans of the kind at issue in *Fisher*?<sup>281</sup> The forms of demographically aware school districting that Justice Kennedy discussed in *Parents Involved*?<sup>282</sup> (In *Ricci*’s wake, commentators have suggested that facially neutral laws like Texas’s percent plan might stand outside *Ricci*’s reach, because the admissions program does not have a perceptible adverse impact on whites,<sup>283</sup> or what Professor Richard Primus termed “visible victims”;<sup>284</sup> in so doing, these commentators are reasoning about liability for discriminatory purpose as if it were tied to citizens’ judgments about the fairness of government action, precisely as it is in the affirmative action cases.)

<sup>279</sup> Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837 (2011).

<sup>280</sup> The Court has recently emphasized this narrow tailoring requirement. *Fisher v. Univ. of Tex.* at Austin, 133 S. Ct. 2411, 2420 (2013) (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If ‘a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,’ then the university may not consider race.” (alteration in original) (citation omitted) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986))); see *infra* p. 61 (discussing narrow tailoring in *Fisher* with particular reference to the *Ricci* decision). Justice Scalia endorsed government using facially neutral criteria to increase minority participation as early as *Croson*. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment) (“A State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race. . . . Such programs may well have racially disproportionate impact, but they are not based on race.”).

<sup>281</sup> See Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 233 (2010) (“[I]f *Ricci* augurs the beginning of the constitutional end of statutory disparate impact provisions, an even broader range of governmental action is at risk . . . such as Texas’s ‘Ten Percent Plan.’”). For one scholar using *Ricci* to argue against the constitutionality of percent plans, see Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATO SUP. CT. REV. 53, 73 (“As in *Ricci*, the [Texas] government used a facially neutral policy to pursue a racially conscious agenda. Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas’s racial motivations predominated in the institution of the plan.”).

<sup>282</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means . . . . These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

<sup>283</sup> See Adams, *supra* note 279, at 875 (suggesting that the use of percent plans for university admissions is likely to be constitutional); *id.* (“[T]he concept of ‘because of’ race does not include facially race-neutral, yet race-dependent, government action where the effect on white students is diffuse and amorphous . . . .”).

<sup>284</sup> Primus observes that *Ricci* might be read to call into question disparate impact law generally, or alternatively, to call into constitutional question facially neutral forms of state action that have “visible victims.” Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343–45, 1362 (2010).

*Ricci* raised constitutional questions about this wide range of practices because it broke with the *Feeney* framework that for decades has governed the constitutionality of facially neutral state action, whether that facially neutral state action has adverse impact on minority or majority groups, whether it integrates or segregates. In the criminal law cases we examined, government engaged in facially neutral state action in pursuit of legitimate ends under circumstances where it was clear the government's action would have substantial adverse impact on minorities, and in these cases courts held the laws constitutional because plaintiffs did not show government acting, at least in part, to inflict adverse impact on minorities.<sup>285</sup> Reasoning along similar lines, the Second Circuit has also drawn on *Feeney* to reject reverse-discrimination challenges to disparate impact law.<sup>286</sup>

But in *Ricci*, neither Justice Kennedy nor Justice Scalia held the discriminatory purpose claims of majority claimants to the *Feeney* standard. It could be that the Court is preparing to eliminate *Feeney*'s required showing of specific intent to harm as part of the discriminatory purpose standard for all claimants, and not just majority claimants. Perhaps plaintiffs need only show that government actors could plainly foresee the adverse racial impact of facially neutral policies they adopt in order for government actors to be held constitutionally responsible for violating the equal protection rights of those citizens harmed by such policies. If so, the Court would be much more likely to find an equal protection violation when law enforcement questions every black student at a college as a potential suspect in an off-campus crime, or adopts a 100:1 sentencing ratio for crack and powder cocaine.

But this outcome seems exceedingly unlikely. Instead, in *Ricci* the Court seemed to be carving out a different discriminatory purpose standard for majority and minority plaintiffs. *Ricci* seemed to put a "racial thumb on the scales" for certain discriminatory purpose claimants, allowing majority plaintiffs to challenge a civil rights law by standards not available to minority plaintiffs challenging the criminal law. With conservative interest in challenging disparate impact on statutory and constitutional grounds high, the Court has taken another disparate impact case for the 2013 Term.<sup>287</sup>

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<sup>285</sup> See pp. 50–51.

<sup>286</sup> See *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 50–51 (2d Cir. 1999) (rejecting argument "that designing the police officers' entrance exam to mitigate the negative impact on minority candidates (thereby improving their chances for selection) is akin to an intent to discriminate against appellants" on the grounds that it was not sufficient "to state a claim that the County intended to discriminate against appellants because it does not demonstrate that the County designed the exam 'because of' some desire to adversely affect appellants" (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979))).

<sup>287</sup> The Court recently agreed to hear a disparate impact case arising under fair housing legislation. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011),

### III. EQUALITY DIVIDED IN THE SUPREME COURT'S 2012 TERM

The race decisions of the Supreme Court's 2012 Term entrench and extend the divide in equality law that the Foreword charts. In *Fisher*, the Court focuses equal protection scrutiny on affirmative action in a framework that has become so familiar that most no longer notice the forms of state action that the framework excludes. The restrictions *Shelby County* imposes on civil rights law are, by contrast, unprecedented. Yet in striking down a key provision of the Voting Rights Act of 1965, the *Shelby County* majority echoes a central *Fisher* theme. Both decisions give constitutional protection to those who resent civil rights laws, in doing so, continuing conflicts over civil rights that reach back at least as far as the Reagan Administration.<sup>288</sup>

The understandings expressed in the Term's same-sex marriage decisions have also been forged in decades of conflict. In this important respect, *Windsor* and *Perry* share themes in common with the Term's race cases. Yet the contrast between the Term's race cases and *Windsor* could not be more striking. Emerging from a closely divided Court, *Windsor* models minority-protective equal protection review of a kind now not seen in the race discrimination decisions of the United States Supreme Court. This contrast — by some measures, the difference of a vote — prompts reflections on equality's future.

#### A. A Tale of Two Fishers

Within the current horizon of equal protection law, the Court's decision in *Fisher v. University of Texas at Austin* appears as a nonevent, a "black-letter" restatement of governing law. As one observer put it: "It charts no new doctrinal territory but instead reads more like a hornbook on strict scrutiny."<sup>289</sup> But considered within a longer time

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*cert. granted*, 133 S. Ct. 2824 (2013). Although the case presents a question of statutory interpretation — whether the Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006) (FHA), recognizes disparate impact liability — petitioners rely, in part, on a constitutional avoidance argument: the Court should interpret the FHA to preclude disparate impact liability because otherwise the law would "compel[]" local government officials to "explicitly consider race" in their property development decisions in constitutionally questionable ways. See Petitioners' Opening Brief at 1, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S. Aug. 26, 2013). Petitioners' claims about the constitutionality of disparate impact law reach beyond the majority opinion in *Ricci*, which focused on the particular circumstances surrounding the retesting of applicants for promotion, see *supra* p. 54, but did not address the constitutionality of disparate impact law generally.

There is some chance the *Mt. Holly* case may settle. See Alan S. Kaplinsky, *Parties in Mt. Holly Case Hire Supreme Court Advocates*, CFPB MONITOR (July 29, 2013), <http://www.cfpbmonitor.com/2013/07/29/parties-in-mt-holly-case-hire-supreme-court-advocates>.

<sup>288</sup> See *infra* section III.B, pp. 67–74. On *Shelby County*'s roots in the Reagan years, see *infra* notes 367–368 and accompanying text.

<sup>289</sup> Elise Boddie, *Commentary on Fisher: In with a Bang, Out with a Fizzle*, SCOTUSBLOG (June 24, 2013, 11:05 PM), <http://www.scotusblog.com/2013/06/fisher-v-university-of-texas-in-with-a-bang-out-with-a-fizzle>.

horizon, the seven-Justice majority decision in *Fisher* consolidates a fundamental reorientation of equal protection law.

The admissions program at the University of Texas at Austin is the product of decades of struggle over affirmative action. After the school's race-conscious admissions program was barred in the 1990s, the Texas legislature decided to admit the top ten percent of the graduating class from each high school in the state, with the understanding that rewarding excellence in this way would increase diversity because of segregation in the public school system.<sup>290</sup> When the Court upheld consideration of race to promote diversity in university admissions in *Grutter v. Bollinger*,<sup>291</sup> Texas added a race-conscious component to the consideration of students not admitted under the percent plan in order to increase diversity in different sectors of campus life.<sup>292</sup> In *Fisher*, the plaintiff argued that the school's consideration of race in reading individual applicant files was unconstitutional despite its apparent conformity with *Grutter*, because the percent plan offered Texas other facially neutral means to achieve diversity, and because consideration of race in reading individual files did not sufficiently alter admissions outcomes to justify its costs.<sup>293</sup> The Fifth Circuit, applying *Grutter*, deferred to the academic judgment of the school.<sup>294</sup>

The Supreme Court reversed the Fifth Circuit on its application of the standard of review, calling for closer judicial oversight of the means by which schools achieve diversity: "Although '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'"<sup>295</sup> The university is to demonstrate that "available, workable race-neutral alternatives do not suffice,"<sup>296</sup> and the reviewing court is to take the university's "experience and expertise" into account, but retains final judgment on the question.<sup>297</sup> Yet the Court remanded for review under this standard without supplying clear guidance as to its application in the case. Only Justice Ginsburg dissented, criticizing the Court's emphasis on increas-

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<sup>290</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (Ginsburg, J., dissenting).

<sup>291</sup> 539 U.S. 306 (2003).

<sup>292</sup> *Fisher*, 133 S. Ct. at 2416 (discussing the University's study, which showed small classes lacked "significant enrollment" by minority students and "'anecdotal' reports" about minority students' "interaction[s] in the classroom").

<sup>293</sup> Brief for Petitioner at 42 & n.10, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

<sup>294</sup> *Fisher*, 133 S. Ct. at 2417 (citing *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217-18 (5th Cir. 2011)).

<sup>295</sup> *Id.* at 2420 (alteration in original) (quoting *Grutter*, 539 U.S. at 339 (emphasis added)).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

ing oversight,<sup>298</sup> defending the principled consideration of race in admissions,<sup>299</sup> and questioning the constitutional good served by pressuring a school to increase integration through the blunt and only nominally indirect form of the percent plan.<sup>300</sup>

*Fisher* preserved affirmative action, and in this sense can be read as a liberal decision of a racially conservative court. *Fisher* affirmed a constitutional framework that allows race-conscious consideration of individual applicants to promote diversity in university admissions, even as the decision clearly invites continued challenges to such admissions programs and directs yet more active judicial oversight of them.

As importantly, in discussing the importance of exploring alternative methods to promote diversity that do not individuate by race,<sup>301</sup> *Fisher* reaffirmed government's constitutional authority to promote diversity by race-conscious facially neutral means such as the percent plan. In this respect, *Fisher* put the full weight of the Court behind views Justice Kennedy emphasized in his concurring opinion in *Parents Involved*.<sup>302</sup> Government can employ race-conscious means to promote diversity or equal opportunity, but if it does so, it must proceed in ways that preserve public confidence in fair dealing, to minimize the risk of racial resentment. (*Fisher's* discussion of narrow tailoring suggested that neither Justice Kennedy's nor Justice Scalia's opinions in *Ricci* were really concerned with unconstitutional purposes. At bottom, Justice Kennedy's and Justice Scalia's opinions in *Ricci* were concerned about the meaning and impact of race-conscious state action; they cared — as other discriminatory purpose cases do not — about the ways majority groups understand and experience state action undertaken for benign, race-conscious reasons.<sup>303</sup>)

Yet taking a step back, and situating *Fisher* in a wider equal protection field, the case looks considerably less "liberal" in logic. Seven members of the Court signed on to an opinion that consolidated a reor-

<sup>298</sup> *Id.* at 2434 (Ginsburg, J., dissenting) ("As I see it, the Court of Appeals has already completed that inquiry, and its judgment . . . merits our approbation.").

<sup>299</sup> *Id.* at 2433 ("I have several times explained why government actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality.'" (quoting *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting))).

<sup>300</sup> *Id.* ("I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternative[] as race unconscious.").

<sup>301</sup> *Id.* at 2420 (majority opinion).

<sup>302</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means . . . . These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").

<sup>303</sup> Commentators have predicted that *Ricci* might be enforced with attention to these factors. See *supra* p. 57.

ientation of equal protection law, with only one Justice dissenting. The outlines of this change cannot be discerned when the affirmative action cases are examined in isolation. The significance of attending to the discrimination claims of the majority depends in significant part on the forms of oversight that courts devote to the review of minority claims. *Fisher* represents a body of equal protection law that devotes special resources to majority claims it no longer provides to minority claims. It is not simply that courts have defined the triggers for strict scrutiny so that strict scrutiny scarcely ever applies to claims that members of minority groups bring today.<sup>304</sup> More importantly, the body of strict scrutiny law that courts have developed for reviewing majority claims requires government to respect citizen concerns about fairness in a way that discriminatory purpose law does not. Over time courts enforcing equal protection have come to intervene in the decisions of representative government to protect members of majority groups in ways they scarcely ever intervene to protect members of minority groups. Considered in this larger context, a case like *Fisher* turns the reasoning of *Carolene Products* on its head.<sup>305</sup>

Over the years, the Court has come to emphasize that the benefits of strict scrutiny in a case like *Fisher*'s flow not only to *Fisher* and other white applicants, but to all.<sup>306</sup> This claim of common benefit appears tacitly to acknowledge that focusing strict scrutiny on the majority's claims of discrimination must also provide benefit to minorities for the present shape of equal protection doctrine to make sense. But can a body of law focused on redress of Abigail *Fisher*'s experience of inequity in fact deliver to "all persons"<sup>307</sup> the equal protection of the laws? Is the "hurt"<sup>308</sup> she experiences sufficiently distinctive, or repre-

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<sup>304</sup> Nearly all the Court's strict scrutiny cases are brought by members of majority groups. For a rare exception, see *Johnson v. California*, 543 U.S. 499 (2005), which applied strict scrutiny to a prison policy separating prisoners by race. See *id.* at 509. Notably, Justice Thomas, joined by Justice Scalia, dissented, arguing that although the Court had previously indicated that racial classifications should be strictly scrutinized, the "Constitution has always demanded less within the prison walls." *Id.* at 524 (Thomas, J., dissenting).

As importantly, courts do not apply strict scrutiny to many practices that distinguish by race — prominently including common practices of suspect apprehension. See *supra* notes 235–242 and accompanying text. For two recent decisions that break with standard practice, see *infra* notes 311–332 and accompanying text.

<sup>305</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting heightened scrutiny for laws directed against "discrete and insular minorities"); see also *supra* pp. 6–7.

<sup>306</sup> See *supra* notes 204–211 and accompanying text.

<sup>307</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.).

<sup>308</sup> Transcript of Oral Argument at 23, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (Justice Kennedy questioning attorney representing Abigail *Fisher*) ("[A]re you saying that you shouldn't impose this hurt or this injury, generally, for so little benefit; is . . . that the point?"); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (rejecting "the assump-

sentative, that it could warrant the present allocation of oversight and concern in equal protection doctrine?

The questions posed of the Court's doctrine can also be posed of its docket. When the Court chooses equal protection cases, on whose stories does the Court focus the nation's attention? What messages about the shape of race privilege and discrimination does the Court's selection of equal protection cases teach? Before handing down *Fisher*, the Roberts Court had already decided to hear yet another case concerning affirmative action.<sup>309</sup> By contrast, the Court has yet to explain how its equal protection decisions apply to government consideration of race in the apprehension of persons suspected of crimes, declining to hear such cases despite widespread concern about racial profiling.<sup>310</sup>

tion[] that these sweeping race-based classifications of persons . . . cause no hurt or anger of the type the Constitution prevents").

<sup>309</sup> See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (holding that a voter-initiated amendment to the Michigan Constitution that prohibits Michigan's public colleges and universities from granting preferential treatment to anyone on the basis of race, sex, color, ethnicity, or national origin violates the Equal Protection Clause), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013). The Court also agreed to hear another challenge to disparate impact. See *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013); *supra* note 287.

<sup>310</sup> The Supreme Court has repeatedly denied certiorari in cases in which plaintiffs have brought equal protection challenges to law enforcement's classification by race during suspect apprehension. See, e.g., *Monroe v. City of Charlottesville*, 130 S. Ct. 1740 (2010) (mem.) (denying certiorari on the question of "[w]hether equal protection review of explicitly race-based classifications made by the police is absolutely precluded where the racial component of the classification is provided by a crime victim," Petition for Writ of Certiorari at i, *Monroe*, 130 S. Ct. 1740 (No. 09-795)); *Brown v. City of Oneonta*, 534 U.S. 816 (2001) (mem.) (denying certiorari on the question of "[w]hether the United States Court of Appeals for the Second Circuit erred in concluding that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is not implicated by a complaint that alleges that law-enforcement officials, in response to a report that a young, black male committed a crime, targeted for questioning and physical examination the entire minority community of a municipality solely and expressly on the basis of race and to the exclusion of all nonracial identifying information," Petition for a Writ of Certiorari at i, *Brown*, 534 U.S. 816 (No. 00-1728)).

The Court's failure to explain how equal protection constrains consideration of race in suspect apprehension might be less concerning if the Court imposed serious constitutional constraints on consideration of race in suspect apprehension under the Fourth Amendment. But in *Whren v. United States*, 517 U.S. 806 (1996), the Court unanimously held that so long as a police officer has objective probable cause to effect a traffic stop, the officer's subjective intent is irrelevant under the Fourth Amendment, despite the petitioners' concern that this low threshold would continue to enable the police to single out drivers by race. *Id.* at 810. Though the Court has had the opportunity to clarify the role of ethnic or racial appearance in establishing reasonable suspicion for a stop, it has refrained from doing so. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (holding that "Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required" and observing that "[t]he danger of stigmatic harm of the type that the [Supreme] Court feared overbroad affirmative action programs would pose is far more pronounced in the context of police stops in which race or ethnic appearance is a factor"), *cert. denied*, 531 U.S. 889 (2000).

The Court in *Whren* did leave open the possibility of an equal protection challenge to police stops motivated by race. 517 U.S. at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the con-

The summer the Court handed down *Fisher*, lower courts endeavored to make equal protection speak to practices of racial differentiation in ways that the Roberts Court does not. In *Floyd v. City of New York*,<sup>311</sup> a federal district court judge held that New York City's "stop and frisk" policy violated the Constitution, after years of complaints that the police had targeted minorities and minority neighborhoods for high "quotas" of stops, without reasonable basis.<sup>312</sup> In 2006, for example, "more than 85% of those stopped were either black or Latino, and nearly 90% were released without being charged."<sup>313</sup> Citizens who have likely never heard of Abigail Fisher recounted their experience of being singled out on the basis of race — not once, but over and over and over — and over and over. "The police would stop, come out of the car, frisk us whenever they felt like it," recalled one Hispanic officer who spoke out about his concerns that he was expected to stop and frisk minorities.<sup>314</sup> "You were Hispanic or black in a high-crime location — it happened every day, and you just got used to it. . . . At first you get upset. But after they hit you or arrest you . . . , you get to know real quick: Just let them search you and they'll go away."<sup>315</sup> Or: "When you're young and you're black, . . . you fit the description. . . . From the time I was 15 to 18, I would say I was stopped, questioned, and frisked for at least 60 to 70 times. . . . I felt like the only reason that I got stopped and frisked is because I was black."<sup>316</sup> The City argued that the policy targeted crime, not race, and invoked *Feeney*: so long as the City was targeting crime, the policy's foreseeably adverse impact on minority citizens and communities did not rise

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stitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." But it has subsequently refused to consider such cases. See *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006), *cert. denied*, 552 U.S. 947 (2007) (denying certiorari to a question involving the evidentiary standards used to evaluate racial profiling claims under the Fourteenth Amendment); *United States v. Martinez*, 354 F.3d 932 (8th Cir. 2004), *cert. granted and judgment vacated*, 549 U.S. 1164 (2007) (granting certiorari and vacating judgment only as to the petitioner's claim regarding sentencing under mandatory guidelines and ignoring the petitioner's Fourteenth Amendment claim).

<sup>311</sup> No. 08 Civ. 1034 (SAS), 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. Aug. 12, 2013).

<sup>312</sup> *Id.* at \*21–24; see Joseph Goldstein, *Police Dept.'s Focus on Race Is at Core of Ruling Against Stop-and-Frisk Tactic*, N.Y. TIMES, Aug. 14, 2013, at A18.

<sup>313</sup> Michael Howard Saul, *Harsh Words as Frisk Bills Proceed*, WALL ST. J., June 25, 2013, at A17; see also Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages at 27, *Floyd*, 2013 U.S. Dist. LEXIS 113271 (No. 08 Civ. 1034 (SAS)).

<sup>314</sup> Jennifer Gonnerman, *Officer Serrano's Hidden Camera*, N.Y. MAG., May 27, 2013, at 24, 26 (quoting Pedro Serrano) (internal quotation marks omitted).

<sup>315</sup> *Id.* at 26–27 (quoting Pedro Serrano) (internal quotation marks omitted).

<sup>316</sup> Julie Dressner & Edwin Martinez, *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/video/2012/06/12/opinion/100000001601732/the-scars-of-stop-and-frisk.html> (quoting Tyquan Brehon, a young African American man living in Brooklyn); see also *id.* ("Young men of color are targeted. Period. End of story." (quoting Drew, Brehon's teacher)).



to constitutional concern.<sup>317</sup> The City believed that the crime reduction it attributed to the policy justified the policy's costs.<sup>318</sup> Even the black mayoral candidate who supported the policy spoke in anger about its excesses and worried how he would prepare his thirteen-year-old stepson to walk on city streets.<sup>319</sup>

Are these concerns constitutional? Do they lie only in the province of the Fourth Amendment? Does equal protection have a distinctive role to play in shaping public conversation about these difficult questions? The judge in *Floyd* thought so. In addition to finding that the policy violated the Fourth Amendment,<sup>320</sup> the judge concluded that the New York City Police Department (NYPD) acted with a discriminatory purpose when it selectively enforced<sup>321</sup> the stop-and-frisk policy against minorities by “directing its commanders to focus their stop activity on ‘the right people’ — the demographic groups that appear most often in a precinct’s crime complaints.”<sup>322</sup> The judge reasoned that this practice of targeting racially defined groups based on their prevalence in aggregated criminal-suspect statistics — and not in response to specific suspect descriptions — was unconstitutional “indi-

<sup>317</sup> See, e.g., Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment at 22, *Floyd*, 2013 U.S. Dist. LEXIS 113271 (No. 08 Civ. 1034 (SAS)) (“[D]efendants have a legitimate law enforcement purpose for [the New York City Police Department’s] deployments of officers to predominantly African American and/or Latino neighborhoods and] plaintiffs cannot prove any discriminatory motive by the City in making such deployments.”); *id.* (“Here, nothing in the record demonstrates that the City’s method for deploying police resources was originally established or continued because it would accomplish the collateral goal of depriving plaintiffs of their rights.” (citing *McKleskey v. Kemp*, 481 U.S. 279, 298 (1987); and *Pers. Adm’r v. Feeney*, 422 U.S. 256, 279 (1979))).

<sup>318</sup> Jeffrey Toobin, *Annals of Law: Rights and Wrongs: Stop-and-Frisk on Trial*, NEW YORKER, May 27, 2013, at 36, 40; Tamer El-Ghobashy & Michael Howard Saul, *Stop-and-Frisk Drops — Plummet in Disputed Tactic Tracks Overall Decrease in Crime*, WALL ST. J., May 7, 2013, at A19.

<sup>319</sup> Michael Barbaro, *Thompson Sees No Need to Bar a Police Tactic*, N.Y. TIMES, May 30, 2013, at A1 (quoting William C. Thompson, Jr., recalling a conversation with his stepson about the likelihood he would be stopped by the police and asking himself, “[w]hy am I having this conversation with a 13-year-old, who really is just a child?” (internal quotation marks omitted)); see also Michael Barbaro & Nate Schweber, *Invoking Zimmerman, Thompson Seizes New York Frisking as Issue*, N.Y. TIMES, July 29, 2013, at A1 (quoting Mr. Thompson’s condemnation of “a policy that all but requires our police officers to treat young black and Latino men with suspicion, to stop them and frisk them because of the color of their skin” (internal quotation mark omitted)).

<sup>320</sup> *Floyd*, 2013 U.S. Dist. LEXIS 113271, at \*314–20.

<sup>321</sup> *Id.* at \*322–38.

<sup>322</sup> *Id.* at \*108. In support of this conclusion, the judge cited trial testimony from the highest-ranking uniformed member of the NYPD admitting that the NYPD stops “the right people,” *id.* at \*148, not always based on specific complaints but rather “based on the totality of . . . who is doing th[e] shootings,” by which he meant “young men of color in their late teens, early 20s,” *id.* at \*149 (emphasis omitted). See also *id.* at \*156 (citing trial testimony from a state senator who reported that NYPD Commissioner Ray Kelly told him that the stop-and-frisk policy focused on young blacks and Hispanics “because [Kelly] wanted to instill fear in them, every time they leave their home, they could be stopped by the police” (internal quotation marks omitted)).

rect racial profiling”<sup>323</sup> because it “assume[d] that *all* members of a racially defined group are ‘the right people’ to target for stops because *some* members of that group committed crimes.”<sup>324</sup> The judge also found that this practice of stopping people “in part because of their race”<sup>325</sup> based on general suspect data involved express racial classifications that warranted — and failed to withstand — strict scrutiny.<sup>326</sup>

*Floyd* was in fact the second of two equal protection decisions on profiling handed down at the time of *Fisher*. Earlier in the summer, a federal district court judge appointed by President George W. Bush held in *Melendres v. Arpaio*<sup>327</sup> that Sheriff Joe Arpaio’s anti-immigration sweeps in Maricopa County, Arizona, violated equal protection because they impermissibly used race as a factor in stops.<sup>328</sup> After finding that local officials had been trained that they could use Mexican appearance as a factor in immigration stops by the Immigration and Customs Enforcement Office of the Department of Homeland Security (ICE) (whose training manual in turn cited the Supreme Court’s own case law<sup>329</sup>),<sup>330</sup> the judge went on to hold that Sheriff Arpaio’s department was classifying on the basis of race within the

<sup>323</sup> *Id.* at \*108.

<sup>324</sup> *Id.* at \*328 n.767.

<sup>325</sup> *Id.* at \*326.

<sup>326</sup> See *id.* at \*328 (“When an officer is directed to target ‘male blacks 14 to 21’ for stops *in general* based on local crime suspect data . . . the reference to ‘blacks’ is an express racial classification subject to strict scrutiny.” (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)); *id.* (finding that the City could not defend the NYPD’s policy of indirect racial profiling as “narrowly tailored to achieve a compelling government interest”).

<sup>327</sup> No. PHX-CV-07-02513-GMS, 2013 WL 2297173 (D. Ariz. May 24, 2013).

<sup>328</sup> *Id.* at \*67–73; 154 CONG. REC. 14,113 (2008) (noting confirmation of Judge G. Murray Snow).

<sup>329</sup> The court specifically referenced ICE’s January 2008 Officer Training Manual, which was used to train the officers in Maricopa County. *Melendres*, 2013 WL 2297173, at \*19. The manual concludes from the Supreme Court’s decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), that race may be “a relevant factor” that could be used in forming a reasonable suspicion to conduct a traffic stop, though “standing alone,” it is “insufficient.” *Melendres*, 2013 WL 2297173, at \*19 (quoting U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., 287(G) OFFICER TRAINING: CIVIL RIGHTS/SEARCH AND SEIZURE 7 (2008)); see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ACADEMY: GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 9 (2006) (stating ICE’s position on racial profiling and informing officers that “in enforcing laws protecting the integrity of the Nation’s borders,” they may “consider race or ethnicity . . . to the extent permitted by the Constitution” and “existing statutory . . . standards”).

As the court observed, while the Supreme Court held that Mexican appearance could be considered in forming a reasonable suspicion for a stop, so long as it was not the sole basis, see *Melendres*, 2013 WL 2297173, at \*65 (citing *Brignoni-Ponce*, 422 U.S. at 886–87), the Ninth Circuit has concluded that in border regions where a significant portion of the legally resident population is Hispanic in origin, Mexican appearance is no longer sufficiently probative for these purposes, see *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–33 (9th Cir. 2000) (en banc).

<sup>330</sup> *Melendres*, 2013 WL 2297173, at \*18–19.

meaning of the affirmative action cases,<sup>331</sup> and used this to support finding discriminatory purpose in the case.<sup>332</sup>

A Supreme Court concerned with ensuring that equal protection address the harms of “all” racial classifications might engage with practices of racial differentiation involved in suspect apprehension before taking yet another affirmative action case — or suggesting exceptions to discriminatory purpose doctrine that might enable plaintiffs to challenge civil rights laws on terms not available to plaintiffs challenging the criminal law. One can ask: Is government consideration of race in these cases sufficiently like affirmative action? Or one can ask: How has affirmative action come to be the measure of equal protection? On whose experience of harm and whose expectations of fairness does the body of equal protection law consolidated in *Fisher* focus?

### B. Shelby County: Majority-Protective Equality Review, Redux

If one reads the Court’s decision in *Fisher* in light of the *Floyd* and *Melendres* cases, it is easy to recognize the Court that struck down provisions of the Voting Rights Act of 1965 in *Shelby County*. *Fisher* consolidates a reorientation in judicial review of a kind that *Shelby County* explosively initiates. In both decisions the Court restricted government action designed to protect minority opportunities because the Court was concerned about the affronts and burdens that protecting minority opportunities imposes on others. Yet in *Shelby County*, the Court intervened in democratic decisionmaking on an unprecedented scale, breaking with decades of deference the Court has accorded Congress’s judgment in enacting the central civil rights statutes of the Second Reconstruction to invalidate a key provision of the Voting Rights Act. The Court decided to strike down the formula for determining which states have to secure preclearance of changes in voting rules, because, in the Court’s judgment, the covered states’ records had improved sufficiently that Congress should no longer have subjected them to disparate treatment. The argument shares family resemblances with the claims of reverse discrimination that shape *Fisher*. This is not accidental. Concern with restricting the Voting Rights Act, like concern with restricting affirmative action, has deep

<sup>331</sup> *Id.* at \*67 (“The [Sheriff’s Office’s] policies and practices, some of which it apparently received from ICE, expressly permitted officers to make racial classifications. Such racial classifications are subject to strict scrutiny, and the policies here fail to withstand that scrutiny . . .” (citing *Parents Involved*, 551 U.S. 701)); see also *id.* at \*69 (“In *Grutter*, the Supreme Court applied strict scrutiny to a policy which involved race as one factor among many even though plaintiff’s expert conceded that ‘race is not the predominant factor’ in the policy.” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003))).

<sup>332</sup> See *id.* at \*70 (citing *Parents Involved*, 551 U.S. at 741; and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

roots in the Reagan Administration.<sup>333</sup> But in invalidating the coverage provisions of the Voting Rights Act, the Roberts Court gave these concerns unprecedented constitutional expression. The deep shift in judicial review the majority introduces is most visible in its sheer contrast with the dissent.

Justice Ginsburg's dissent for four members of the Court tells a decades-familiar story about struggles in democratic self-government under respectful judicial oversight. A century after ratification of the Fifteenth Amendment, barriers to minority voting remained pervasive, and changed in form as they were constrained by law. After bloody confrontations over civil rights in the 1960s, Congress intervened, and, drawing on its power to enforce the Fifteenth Amendment, enacted the Voting Rights Act.<sup>334</sup> The Act enunciated national standards governing claims of race discrimination in voting, and set up special procedures requiring preclearance of electoral changes in jurisdictions with the most concentrated records of discrimination; these procedures relieved plaintiffs of the burden of challenging each change.<sup>335</sup> The Act fundamentally altered minority access to the polls, prompting jurisdictions to impose "second-generation barriers" such as changing voting districts to dilute or restrict the impact of minority voting.<sup>336</sup> Responding to evidence of these new barriers, Congress several times amended and extended the Voting Rights Act, most recently in 2006. After conducting extensive hearings and compiling a vast record, Congress found significant progress in eliminating first-generation barriers to ballot access, leading to increased voter registration and turnout and to the election of minority officials.<sup>337</sup> But Congress also found persisting intentional racial discrimination,<sup>338</sup> "second generation barriers constructed to prevent minority voters from fully participating in the electoral process' . . . [,] as well as racially polarized voting in the covered jurisdictions."<sup>339</sup> On the basis of these and other findings, Congress decided to renew the Act, including its preclearance coverage provisions, for another twenty-five years and to review this judgment in fifteen years.<sup>340</sup>

On the dissent's account, this judgment was, under the Constitution and by longstanding precedent, in the first instance Congress's to

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<sup>333</sup> See *infra* notes 367–368 and accompanying text.

<sup>334</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2633–34 (Ginsburg, J., dissenting).

<sup>335</sup> *Id.* at 2634.

<sup>336</sup> *Id.* at 2634–35.

<sup>337</sup> *Id.* at 2635–36.

<sup>338</sup> *Id.* at 2636.

<sup>339</sup> *Id.* (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, § 2(b)(2), 42 U.S.C. § 1973 note (2006)).

<sup>340</sup> *Id.*

make, and the Court's to review with "substantial deference."<sup>341</sup> "The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States."<sup>342</sup> In upholding the Voting Rights Act in *South Carolina v. Katzenbach*,<sup>343</sup> the Court emphasized that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"<sup>344</sup> — a standard the Court reaffirmed in upholding subsequent reauthorizations of the Act.<sup>345</sup> Reasoning within this framework, the dissenters in *Shelby County* found that Congress had created an ample record of continued discrimination to support its judgment to reauthorize the Act and the coverage formula for preclearance<sup>346</sup>: that there was ongoing discrimination in covered jurisdictions, and a basis for concluding the risk of discrimination was higher in the covered jurisdictions than elsewhere;<sup>347</sup> that litigation in covered jurisdictions was an inadequate substitute for preclearance;<sup>348</sup> and finally that the Act contained workable mechanisms to adjust preclearance so that jurisdictions could be bailed in or out of preclearance.<sup>349</sup>

The majority covered this same history but with fundamentally different preoccupations. It began from concern about the impositions of civil rights law on the states. The majority was more concerned about the "disparate treatment"<sup>350</sup> that civil rights law inflicts on states than the disparate treatment that discrimination inflicts on citizens. This concern led the majority to ignore longstanding precedents on the deference the Court owes Congress in reviewing an exercise of its power to enforce the provisions of the Reconstruction Amendments. Instead, the Court took for itself a primary role in determining whether Congress was justified in distinguishing among states as the preclearance mechanisms of the Voting Rights Act did. Both the focus of the ma-

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 2637; *see id.* (citing AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 361, 363, 399 (2005)).

<sup>343</sup> 383 U.S. 301 (1966).

<sup>344</sup> *Id.* at 324.

<sup>345</sup> *Shelby Cnty.*, 133 S. Ct. at 2637–38 (Ginsburg, J., dissenting) (citing *Katzenbach*, 383 U.S. at 324; and *City of Rome v. United States*, 446 U.S. 156, 178 (1980)). The dissent also emphasized the Court's prior reliance on the standard in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), of all appropriate means. *See Shelby Cnty.*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421).

<sup>346</sup> *Shelby Cnty.*, 133 S. Ct. at 2639 (Ginsburg, J., dissenting).

<sup>347</sup> *Id.* at 2640–43.

<sup>348</sup> *Id.* at 2640.

<sup>349</sup> *Id.* at 2644.

<sup>350</sup> *Id.* at 2619 (majority opinion) ("The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.").

jority's concerns, and its determination to intervene, align with the affirmative action cases. But unlike *Fisher*, which a quarter century after *Croson* speaks in cadences of ordinary or "black letter" law, *Shelby County* is inventing a new framework of review, of as yet indeterminate reach.

The majority ignored decades of law governing the Court's review of the Voting Rights Act. The Court simply proceeded from a sentence in the 2009 judgment in *Northwest Austin Municipal Utility District No. One v. Holder*<sup>351</sup> in which it stated "the Act imposes current burdens and must be justified by current needs."<sup>352</sup> The majority noted in a footnote in *Shelby County* that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin* . . . and accordingly *Northwest Austin* guides our review under both Amendments in this case."<sup>353</sup> It then read *Northwest Austin* as requiring that "a departure from the fundamental principle of equal sovereignty [of the states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."<sup>354</sup> In this short passage the majority changed both the framework of review and the principle on which it is exercised.

Beginning with a focus on the equality and dignity of states rather than persons,<sup>355</sup> the Court centered its review on what in *Northwest Austin* it termed "a 'fundamental principle of equal sovereignty' among the States."<sup>356</sup> Where earlier cases on the Reconstruction Amendments described this principle as limited to controlling admission of states to the Union,<sup>357</sup> *Shelby County* began to employ it as a basis for limiting Congress's exercise of power under the Reconstruction Amendments. According to the Court, the principle of equal sovereignty is now "highly pertinent in assessing subsequent disparate treatment of States."<sup>358</sup> From this standpoint, the problem with the preclearance provisions was that they put states in the position of having to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own," assuming of course that the laws were in fact in conformity with the Voting Rights Act.<sup>359</sup> To protect states from this indignity,

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<sup>351</sup> 129 S. Ct. 2504 (2009).

<sup>352</sup> *Shelby Cnty.*, 133 S. Ct. at 2622 (quoting *Nw. Austin*, 129 S. Ct. at 2512) (internal quotation marks omitted).

<sup>353</sup> *Id.* at 2622 n.1.

<sup>354</sup> *Id.* at 2622 (quoting *Nw. Austin*, 129 S. Ct. at 2512) (internal quotation marks omitted).

<sup>355</sup> *See id.* at 2623.

<sup>356</sup> *Id.* (quoting *Nw. Austin*, 129 S. Ct. at 2512) (emphasis omitted).

<sup>357</sup> *Id.* at 2648 (Ginsburg, J., dissenting) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)).

<sup>358</sup> *Id.* at 2624 (majority opinion).

<sup>359</sup> *Id.*

the Court proceeded to examine the record to determine whether Congress had sufficient reason to continue singling out states for unequal burdens.

Having changed the focus of review, and the deference with which it is to be conducted, the Court then differed with Congress's judgment about whether to continue preclearance in the covered jurisdictions. Using benchmarks concerning first-generation discrimination such as registration and turnout only,<sup>360</sup> the majority concluded that the problem Congress undertook to address has been substantially solved, and therefore Congress lacked warrant to continue imposing on the covered states. The affront of the Act was that the Act did not sufficiently reflect the changes the majority's choice of benchmarks measures: "Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were."<sup>361</sup> Because there has been change the Court deemed sufficient, in the Court's judgment Congress must change course.

It is hard to say which is the more striking feature of the opinion. One could focus on the Court's elevation of state dignity over citizen dignity. Or one could marvel at the Court's willingness to treat differentiation among states, in this context, as an affront, without ever explaining how it is different from the other contexts in which Congress differentiates among states.<sup>362</sup> Or one might marvel at the Court's readiness to substitute its judgment for Congress's, without law or apology. Or one might weigh which is more striking: the Court's suggestion that voting discrimination has substantially ended, or the Court's willingness to hobble the statute when the Court acknowledges that the discrimination persists. As the Court cavalierly observes, "[r]egardless of how to look at the record, . . . no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965."<sup>363</sup>

In the end these features of the opinion are interconnected. To begin interpretation of the Civil War Amendments with a demand that Congress justify departures from equal sovereignty effaces the history of the Civil War and the Second Reconstruction,<sup>364</sup> and elevates concern about the equality and dignity of states over the equality and dignity of citizens.

<sup>360</sup> *Id.* at 2625–26 (discussing voter registration and turnout and minority office-holding only).

<sup>361</sup> *Id.* at 2628.

<sup>362</sup> See Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 28–29 (2013) (discussing examples of legislation that treat states unequally, such as benefits formulas or specific line items in appropriations bills).

<sup>363</sup> *Shelby Cnty.*, 133 S. Ct. at 2629 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 331 (1966); and *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009)).

<sup>364</sup> See Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013), <http://www.yalelawjournal.org/images/pdfs/1174.pdf>.

If the Roberts Court were vigorously engaged in defending minorities against discrimination, the *Fisher* and *Shelby County* decisions might read differently than they do. But decisions of the Roberts Court strike down laws that protect minorities against discrimination with a kind of energy they do not bring to striking down laws that reflect "prejudice against discrete and insular minorities,"<sup>365</sup> at least where issues of race are concerned. During argument over the Voting Rights Act in *Shelby County*, Justice Scalia offered observations from which it might be inferred he views inverting *Carolene Products* presumptions as appropriate. He described:

[A] phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.

I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless — unless a court can say it does not comport with the Constitution.<sup>366</sup>

It is precedent breaking for a Justice publicly to discuss the Supreme Court's role in reviewing an act of Congress in this way; but the political views Justice Scalia voiced from the bench are, as he pointed out, not his alone. Hostility to the Voting Rights Act flourished in the Administration of the President who appointed him. President Ronald Reagan won office on a "southern strategy" complaining of the "unequal burdens" the Voting Rights Act imposed on states — a claim he reiterated in criticism of the Act during its 1982 renewal.<sup>367</sup> John

<sup>365</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); cf. Adams, *supra* note 279 (asking, after the Roberts Court's decision threatening to invalidate disparate impact law, whether integration is now a "discriminatory purpose").

<sup>366</sup> Transcript of Oral Argument at 47, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96).

<sup>367</sup> Ronald Reagan appealed to race in campaigning and governing. See *supra* note 164. Reagan won office in a campaign in which he attacked the Voting Rights Act for unequally burdening the South. His Administration then worked to narrow the reach of the law until the bill had cleared Congress. See LAURENCE I. BARRETT, *GAMBLING WITH HISTORY: RONALD REAGAN IN THE WHITE HOUSE* 426 (1983) (reporting that during the 1980 campaign Reagan observed to his biographer "that the 1965 Voting Rights Act had been 'humiliating to the South,'" *id.* (quoting Ronald Reagan), and that a year into office, President Reagan acknowledged, "I was opposed to the Voting Rights Act from the beginning," *id.* (quoting Ronald Reagan) (internal quotation marks omitted), going on "to explain that he objected to the law's vindictive, selective application," *id.*); Lee Lescaze, *Reagan Seeks Assessment of Voting Rights Act*, WASH. POST, June 16, 1981, at A1 (reporting that President Reagan voiced concerns about the "unequal burdens" preclearance imposed on states during his campaign and in office).

During the reauthorization debates, President Reagan wrote the Attorney General expressing concern about "provisions [of the Voting Rights Act] which impose burdens unequally upon different parts of the nation" in a letter that charged the Attorney General with exploring "whether any changes in the Act may be desirable." Letter to the Attorney General Directing an Assessment of the Voting Rights Act, PUB. PAPERS 513, 513 (June 15, 1981).



Roberts's talking points for the Reagan Administration opposed provisions of the Act by comparing them to affirmative action.<sup>368</sup> If one holds the view that voting rights, like affirmative action and disparate impact law, are racial entitlements that do not redress discrimination but instead are political spoils that "place a racial thumb on the scales"<sup>369</sup> and give what members of majority groups are entitled to to minorities instead, then such a view of civil rights laws might supply warrant for turning *Carolene Products* on its head and employing judicial review to cleanse politics. At least, judges holding these views might feel free to act on them if unencumbered by commitments to judicial restraint and original understanding. Justice Scalia apparently feels strongly enough about the urgency of intervening in the enforcement of civil rights laws that he is prepared publicly to voice such views and to strike down civil rights laws, without ever offering a fig leaf of originalist justification of the kind he asserts when identifying with the gun rights movement<sup>370</sup> or opposing gay rights.<sup>371</sup> It is not yet clear, however, how far or fast other members of the conservative

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John Roberts joined in this work. He began as Special Assistant to the Attorney General in 1981 after he finished clerking for then-Associate Justice William Rehnquist, see *Chief Justice John G. Roberts, Jr.: Biography*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html> (last visited Sept. 29, 2013), and in this role helped define the Administration's position in the reauthorization debates, see *supra* p. 24. For some of the restrictions on preclearance the Justice Department entertained proposing, see Robert Pear, *White House Weighs Voting Rights Shift: Reagan Aides Say that Extension of the 1965 Act Would Violate Tenets of States' Rights*, N.Y. TIMES, June 4, 1981, at A1. See also Herbert H. Denton, *Reagan Signs Voting Rights Act Extension*, WASH. POST, June 30, 1982, at A1 (reporting that, despite his objections, President Reagan ultimately signed the amended Act).

<sup>368</sup> See, e.g., *supra* p. 24. In the Administration's campaign to weaken provisions of the Act in 1982, spokespersons frequently drew comparisons between the Voting Rights Act and quotas or affirmative action. See, e.g., *supra* p. 24 (quoting John Roberts's talking points, on which Justice Department officials drew). For use of racial entitlements language in the Voting Rights Act debates of the early 1980s, see *supra* note 121 and accompanying text (quoting Senator Hatch's minority report).

<sup>369</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

<sup>370</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008). See generally Siegel, *supra* note 34 (showing how *Heller* expresses popular constitutionalism that grew out of Reagan Justice Department originalism and the twentieth-century gun-rights movement).

<sup>371</sup> Transcript of Oral Argument at 39–40, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (quoting Justice Scalia repeatedly asking Ted Olson, attorney for the respondents, to identify when the Constitution changed to make unconstitutional prohibitions on gay marriage); see also Jess Bravin, *Scalia Calls Voting Act a "Racial Preferment"*, WALL ST. J., Apr. 17, 2013, at A3 (reporting a discussion of originalism with Justice Scalia in which Justice Scalia pointed out that "homosexuality . . . was known when the 14th Amendment . . . was ratified in 1868 . . . and was considered a crime in most places").

Even originalists are concerned about Justice Scalia's failure to offer any nominally originalist justification in striking down affirmative action. See Rappaport, *supra* note 161, at 2–3 ("[Justices Scalia and Thomas] have not made any real effort to justify their affirmative action opinions based on the Constitution's original meaning. Instead, their decisions have relied on a combination of precedent, moral claims, and legal principles.").

majority are presently prepared to move in restricting civil rights achievements of the twentieth century. But their appetite is evident.

*C. Constitutional Conflict and Constitutional Change  
in the "Marriage Equality" Debates*

It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.

— *United States v. Windsor* (2013)<sup>372</sup>

When movements call for law to recognize the equal "status and dignity" of persons who live in entrenched relations of inequality, the intervention often ignites deep conflict.<sup>373</sup> We now speak of *Plessy v. Ferguson*<sup>374</sup> with shame and *Brown* with pride,<sup>375</sup> but the quest to end segregation engendered the long-running conflict that made "balance" a constitutional dirty word.<sup>376</sup>

Efforts to reorder authority in entrenched relations of inequality can provoke status conflict, whether the intervention is by court decision or other means.<sup>377</sup> A half century ago, the term "backlash" moved from fly-fishing to politics in the bitter debates over the 1964 Civil

<sup>372</sup> 133 S. Ct. 2675, 2689 (2013).

<sup>373</sup> See Siegel, *Constitutional Culture*, *supra* note 32, at 1362–63 (2006) ("[W]hen a movement advances transformative claims about constitutional meaning that are sufficiently persuasive that they are candidates for official ratification, movement advocacy often prompts the organization of a counter-movement dedicated to defending the status quo. At just the point that a movement for social change begins to elicit public response, it is likely also to elicit this energetic defense of [the] status quo, which, since the filibuster over the 1964 Civil Rights Act, has been referred to as 'backlash.'" (footnotes omitted)); see also *id.* at 1389–94, 1403 (describing how the feminist movement's quest for ratification of the Equal Rights Amendment, and for employment discrimination and childcare legislation, prompted the rise of the "family values" movement of the New Right); SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 248 (1991).

<sup>374</sup> 163 U.S. 537 (1896).

<sup>375</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992) ("[W]e think *Plessy* was wrong the day it was decided . . .").

<sup>376</sup> See *supra* note 185 (tracing arguments about "racial balancing" across contexts).

<sup>377</sup> See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2328–29 (1997) (observing that "[g]roups often pursue status competition with amazing vehemence," *id.* at 2328, because of the apprehension that changes in status are "zero-sum," *id.*, with advances in one group's standing threatening decline in another's).

Rights Act,<sup>378</sup> and was televised graphically in “Bloody Sunday” images of African Americans in Selma clubbed for seeking the vote.<sup>379</sup> That bloodshed spurred passage of the Voting Rights Act,<sup>380</sup> and, a half century later, Justices of the U.S. Supreme Court give voice to resentments the Act engendered.<sup>381</sup> Backlash arcs across the decades because there are natural incentives in democratic politics to appeal to those aggrieved by change,<sup>382</sup> whether change transpires by judicial decision, the great civil rights statutes of the 1960s, or the efforts of local government to ensure a modicum of integration in basic social institutions. Backlash is best understood, not as the repression of democratic politics, but its expression: backlash escalates as movements, parties, and officials embrace the cause of those who resent change, in the hopes of winning their support.<sup>383</sup>

Yet if conflict can slow or even crush change, in democracies there are countervailing forces. Those threatened can mobilize, and enter into coalitions, despite their lack of authority. Over time, the struggle for the public’s confidence leads each side to respond to the arguments of the other, forging new constitutional understandings.<sup>384</sup> And even if

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<sup>378</sup> See Siegel, *Constitutional Culture*, *supra* note 32, at 1363 & n.99. For other examples of “backlash” crossing into political usage during the 1960s conflicts over civil rights, see Post & Siegel, *supra* note 35, at 388–89.

<sup>379</sup> See George B. Leonard, *Journey of Conscience: Midnight Plane to Alabama*, NATION, May 10, 1965, at 502, 502 (describing the impact of the televised broadcast of “Bloody Sunday” in Selma, Alabama, “when a group of Negroes at Selma were gassed, clubbed and trampled by horses”). On the voting rights campaign that led to the conflict in Selma, see generally GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2013); GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 375–94 (2006).

<sup>380</sup> See ROBERTS & KLIBANOFF, *supra* note 379, at 391–94.

<sup>381</sup> See *supra* section III.B, pp. 67–74.

<sup>382</sup> Ronald Reagan sought to attract Southern Democrats who opposed their party’s support for civil rights. See *supra* note 164. One way Reagan appealed to these voters was to object to the “unequal burdens” of the Voting Rights Act. See *supra* note 367. John Roberts began his career working on voting rights issues for Reagan, see *supra* notes 367–368, and the other members of the *Shelby County* majority were appointed by President Reagan or served in his administration, see *supra* note 254.

<sup>383</sup> Some describe backlash as distinctively provoked by court decisions that shut down and repress politics. See Post & Siegel, *supra* note 35, at 390–406 (discussing arguments of this kind in constitutional scholarship); see also *infra* note 407. But legislative action — such as the passage of civil rights legislation, or state ratification of the Equal Rights Amendment, or the enactment of health care legislation — can also provoke backlash. The ordinary, healthy operations of democratic politics supply incentives for parties, candidates, and officials to appeal to those aggrieved by change. On race and realignment, see *supra* notes 71–73 and accompanying text, and see also, for example, *supra* note 164. For an account of how the Republican Party drew on the abortion issue to recruit voters who traditionally voted with the Democratic Party — a strategy that began years before *Roe* — see Greenhouse & Siegel, *supra* note 34, at 2052–71.

<sup>384</sup> Siegel, *Constitutional Culture*, *supra* note 32, at 1363–66 (describing how the quest for public support leads contending movements to respond to each other’s arguments and how over time

the public witnessing status conflict recoils — it may, in time, be moved. Civil rights struggle stirs the imagination of the young, and the imagination of the free.<sup>385</sup>

By many measures, the 2012 Term's marriage cases diverge from the race cases. The groups involved differ,<sup>386</sup> the questions in controversy differ,<sup>387</sup> the life cycle of the conflict differs. Yet there is an important ground of commonality linking the sexual orientation and race cases. The race and sexual orientation cases of the Term are the fruit of a long-running conflict over law seeking to vindicate equality values in ways that alter the social standing of groups.<sup>388</sup> Analyzing the Term's marriage equality decisions on the ground of commonality they share with the race cases in turn raises questions about how the race and sexual orientation opinions of the 2012 Term diverge.

Evolving public opinion enabled this Term's marriage decisions,<sup>389</sup> but conflict over law importantly contributed to the public's changing views. An appreciation of equality law's limits and power seems to inform the majority opinion in *Windsor*, which strikes down section 3 of

this conflict "can hone proposed understandings into a form that can be assimilated into the fabric of a constitutional tradition without too greatly disrupting existing ways of life," *id.* at 1366).

<sup>385</sup> For the response of white students to the civil rights movement in the early 1960s, see Fred Powledge, *Rights Movement Stirs Students: Thousands Planning Active Roles for the Summer*, N.Y. TIMES, Mar. 8, 1964, at 61. For one especially vivid account of audience response to televised footage of white troopers clubbing voting rights marchers on Bloody Sunday, see Leonard, *supra* note 379, at 502.

<sup>386</sup> The marriage debates are most commonly understood as involving identity groups, in certain relevant respects resembling conflicts over race and sex. One representative account traces the "widespread and significant discrimination in the United States" to which "gay and lesbian people have been subject." Brief of the Organization of American Historians and the American Studies Association as *Amici Curiae* in Support of Respondent Edith Windsor at 6, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307). But there are many who understand conflicts involving sexuality in terms more focused on conduct than identity. See, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993) (exploring the importance of understanding sexuality as an act as well as a status).

<sup>387</sup> Some view conflicts about sexuality as lacking a distributive dimension and so differing from conflicts about race and gender. See NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 11-39 (1997) (describing conflicts over race and gender status as implicating questions concerning redistribution (for example, material resources) as well as recognition (for example, honor and meaning), while conflicts over sexuality primarily concern relations of recognition). Others understand conflicts over sexuality as fundamentally concerning systems of distribution. See, e.g., Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 53-71 (2011).

The conflict over same-sex marriage certainly has distributive dimensions, but opponents have not focused on the question of fair distribution as they do in the case of affirmative action. Opponents nonetheless understand the question of same-sex marriage as zero-sum (as supporters do not).

<sup>388</sup> See *supra* note 386.

<sup>389</sup> See, e.g., Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES: FIVETHIRTYEIGHT BLOG (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means>.

the Defense of Marriage Act<sup>390</sup> (DOMA) in terms that are plainly designed to influence, without deciding, deliberations about the constitutionality of state laws that restrict same-sex unions. In the process, *Windsor* offers one of the more striking statements of equality law the Court has handed down in decades. What distinguishes *Windsor* from the race cases of the 2012 Term is not the subject matter or reach of the decision, but its determination to redress the dignitary and material injuries law inflicts on a minority group. In *Windsor*, a closely divided Court reasons about equal protection in ways the Court has not reasoned in its race discrimination decisions in a very long time.<sup>391</sup>

1. *Through Backlash to Perry and Windsor*. — Constitutional limits on laws that discriminate on the basis of sexual orientation have dramatically evolved over decades of bitter conflict. Nearly thirty years ago, a deeply divided Supreme Court rejected a gay-rights challenge to a sodomy prosecution, invoking a Constitution that allowed government to criminalize same-sex relationships;<sup>392</sup> federal courts addressing equal protection claims regularly sanctioned laws discriminating against gays, on the grounds that the conduct that defined the class was criminalizable.<sup>393</sup> But state referenda and state constitutional decisions offered other arenas to struggle over equality law.<sup>394</sup> When a Hawaii state court ruled that excluding same-sex couples from marriage presumptively violated the state constitution,<sup>395</sup> its decision prompted a storm of law prohibiting recognition of such unions.<sup>396</sup> Yet, even as the United States Congress passed DOMA<sup>397</sup> and many states followed suit, the Supreme Court had begun to shift course.

<sup>390</sup> 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

<sup>391</sup> In *Windsor*, Justice Kennedy reasons about the equality claims of a minority with the kind of attention and empathy he devotes to the equality claims of the majority in cases like *Fisher*. *Windsor* cites to *Adarand*, an affirmative action decision, as well as to *Brown*'s companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), to establish that the liberty protected by the Fifth Amendment incorporates equality guarantees. See *Windsor*, 133 S. Ct. at 2695.

<sup>392</sup> In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court divided 5–4 in ruling that criminal prosecution for sodomy did not violate the right to privacy, limiting its judgment to the prosecution of sodomy between persons of the same sex. *Id.* at 188 n.2. (The statute itself drew no such distinctions. *Id.* at 188 n.1.)

<sup>393</sup> See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (“Other circuits are in accord . . . [that] because homosexual conduct can . . . be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.”).

<sup>394</sup> See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999); cf. Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (suggesting that state constitutional decisions participate in local and national conversations about constitutional meaning).

<sup>395</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23.

<sup>396</sup> See *infra* note 406.

<sup>397</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996).

With Justice Kennedy on the Court instead of Judge Bork,<sup>398</sup> a Supreme Court with new members began to craft law to amplify the voice of the minority rather than the majority.

As widespread response to the Hawaii decision suggested, law calling customary beliefs of the majority into constitutional question is prone to provoke rather than settle conflict. Dispute on the Supreme Court itself vividly illustrated the dynamic that law questioning traditional authority provokes. When Justice Kennedy wrote for the Court that a law denying protections to gays expressed unconstitutional animus in *Romer v. Evans*,<sup>399</sup> Justice Scalia objected that, under the Constitution, Americans should be free to enact laws excluding homosexuals without being accused of "bigotry."<sup>400</sup> The judgment that Colorado's law reflected unconstitutional animus was "insulting"<sup>401</sup> to the defenders of traditional morality, who, Justice Scalia implied, did not deserve to be put by law in the position of Southerners resisting *Brown*.<sup>402</sup> The objection to being called a bigot proved a powerful call to mobilization, and has echoed across the decades to the dissenting

<sup>398</sup> In nominating Judge Bork, President Reagan intended to send a prominent originalist to the Supreme Court, and to entrench constitutional views on civil rights questions involving race, gender, and sexuality for which Judge Bork was well known. Judge Bork's nomination provoked intense national debate on these questions, and was rejected by the Senate. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); YALOF, *supra* note 72, at 155–61.

In selecting Judge Bork, President Reagan sought to preserve *Bowers*, and to prevent the extension of equal protection to discrimination on the basis of sexual orientation. *The Constitution in the Year 2000* warns that developments of this kind might lead to legal recognition of same-sex marriage. See OLP, *THE CONSTITUTION IN THE YEAR 2000*, *supra* note 130, at 28–29. For some of Judge Bork's views, see *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (opinion by Judge Bork, joined by then-Judge Scalia, applying rational basis scrutiny to an equal protection claim on the understanding that "legislation may implement morality" and accommodate the views of the "many who find homosexuality morally offensive").

After Judge Bork's nomination was defeated, President Reagan ultimately nominated Justice Kennedy in his stead. See YALOF, *supra* note 72, at 164–65.

<sup>399</sup> 517 U.S. 620 (1996); see *id.* at 632 (noting that the law at issue "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," which "seems inexplicable by anything but animus," making the law "an exceptional and . . . invalid form of legislation").

<sup>400</sup> See *id.* at 652 (Scalia, J., dissenting) (objecting to the majority opinion on the grounds that it "verbally disparag[es] as bigotry adherence to traditional attitudes," and asserting that the majority's claim that Colorado's law "springs from nothing more than 'a bare . . . desire to harm a politically unpopular group' . . . is nothing short of insulting" (alterations in original) (quoting *id.* at 634 (majority opinion))).

<sup>401</sup> *Id.*

<sup>402</sup> Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("Bear in mind that the object of this condemnation is not the legislature of some once-Confederate Southern state (familiar objects of the Court's scorn), but our respected coordinate branches, the Congress and Presidency of the United States." (citation omitted)). For critics of *Windsor* associating bigotry and racism, see the remarks of Rush Limbaugh and Ryan Anderson, *infra* note 403.

Justices in *Windsor*, Rush Limbaugh, and beyond.<sup>403</sup> The constitutional questions were framed: Which moral objections to homosexuality were unconstitutional animus — and when?

This is a deeply provocative constitutional question, as Justice Scalia has made more than abundantly clear. Judicial decisions questioning

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<sup>403</sup> Those advocating DOMA's passage took up Justice Scalia's argument. See, e.g., 142 CONG. REC. 16,975–76 (1996) (statement of Rep. Charles Canady) (“We have heard that those who oppose same-sex marriage and those who support this bill are . . . bigoted, despicable, hateful, ignorant. . . . I believe that those words are an insult to the American people . . . . Seventy percent of the American people are not bigots. . . . It is a slander against the American people to assert that they are.”).

Nearly twenty years later, opponents of same-sex marriage continue to argue they should not be addressed as bigots. The claim remained a focal point of mobilization prior to the Supreme Court decision in the marriage cases. See, e.g., Transcript of Proceedings at 3042, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) (addressing the court, Charles Cooper, attorney for defendant-intervenors, dubbed the imputation of bigotry “a slur on 70 of 108 judges who have upheld as constitutional and rational the decision of voters and legislatures to preserve the traditional definition of marriage”); Mara Liasson, *Morning Edition: For GOP Hopefuls, CPAC Is the Place to Be This Week* (NPR radio broadcast Mar. 15, 2013), available at <http://www.npr.org/2013/03/15/174383205/cpac-kicks-off-with-sobering-message> (quoting Senator Marco Rubio's address to the Conservative Political Action Conference, in which he stated that “[j]ust because I believe that states should have the right to define marriage in a traditional way does not make me a bigot”). The question of bigotry was raised in oral argument in *Windsor* by Paul Clement, the attorney defending the constitutionality of DOMA. Transcript of Oral Argument at 112–13, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (“That’s what the democratic process requires. You have to persuade somebody you’re right. You don’t label them a bigot. You don’t label them as motivated by animus. You persuade them you are right. That’s going on across the country.”). In *Windsor*, two of the dissents attacked the majority for addressing defenders of tradition as if they were bigots. *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (“At least without some more convincing evidence that [DOMA’s] principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.”); *id.* at 2718 (Alito, J., dissenting) (“Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.”).

Opening his broadcast on the day of the *Windsor* decision, Rush Limbaugh observed:

Just 18 months ago, the president of the United States opposed gay marriage. Now, 18 months later, we are told that the whole country supports gay marriage, and those who don’t are bigots. That was in the Supreme Court ruling today, that people who oppose gay marriage are bigots and want to deny and want to make fun of and want to impugn and demean homosexuals. . . .

All of a sudden, that was deemed to be exclusionary, and the people who got married of the opposite sex, all of a sudden became these horrible things: Racists, bigots, you name it. So those who were agitating for the change and trying to upset tens of thousands of years of tradition become the virtuous ones, and the defenders of the tradition all of a sudden became bigots and homophobes and who knows whatever the hell else.

Rush Limbaugh, *Just 18 Months Ago, Barack Obama Was a Bigot*, RUSH LIMBAUGH SHOW (June 26, 2013), [http://www.rushlimbaugh.com/daily/2013/06/26/just\\_18\\_months\\_ago\\_barack\\_obama\\_was\\_a\\_bigot](http://www.rushlimbaugh.com/daily/2013/06/26/just_18_months_ago_barack_obama_was_a_bigot) (transcript of radio broadcast); see also Ryan T. Anderson, *The Left’s Three Techniques on Marriage Redefinition — and How to Counter Them*, BLAZE (July 5, 2013, 10:00 AM), <http://www.theblaze.com/contributions/the-lefts-three-techniques-on-marriage-redefinition-and-how-to-counter-them> (“A principal strategy of [same-sex marriage supporters] has been cultural intimidation — threatening defenders of marriage with the stigma of being ‘haters’ and ‘bigots.’ They’ve said anyone who disagrees is the equivalent of a racist.”).

customary understandings that justify relations of inequality excite anger of a distinctive kind. Those with stakes in defending tradition tar these constitutional judgments as antidemocratic in ways they do not paint constitutional judgments invalidating other kinds of laws.<sup>404</sup> Judicial judgments of this kind excite fury because they impugn the authority and self-understanding of those who define themselves through tradition. They raise questions about the kind of authority defenders of tradition exercise when they enforce traditional morality. Are those who defend traditional values discriminating, or discriminating? What kind of morality are they defending in calling for laws that criminalize, discriminate, or exclude?<sup>405</sup> When the law sanctions challenges to customary understandings that justify relations of inequality, it is encouraging conflict that threatens institutions, authority, and honor across social spheres. When that conflict touches on an institution as important to a society's governance and organization as voting, or marriage, the stakes escalate exponentially for all concerned.

The ferocious reaction that the first judgments recognizing marriage equality provoked<sup>406</sup> led some to claim — and others to fear — that courts were impotent to bring about change of this kind. More: judgments challenging customary understandings of marriage might

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<sup>404</sup> See *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) ("It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race."); see also Transcript of Oral Argument, *supra* note 403, at 112–13.

In *Windsor*, Justice Scalia angrily accused the majority of interfering with representative government, even as he urged the Court to strike down the decisions of representative government in *Fisher* and *Shelby County*. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring); *supra* p. 72 (quoting Justice Scalia in oral argument in *Shelby County*).

<sup>405</sup> For one illustration of this dynamic, see Rush Limbaugh's response to the Court's judgment in *Windsor*. See Limbaugh, *supra* note 403.

<sup>406</sup> Following the Supreme Court of Hawaii's 2003 decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which declared that the exclusion of same-sex couples from marriage was subject to strict scrutiny and presumptively unconstitutional under the state constitution, Congress passed DOMA, statutory "mini-DOMAs" passed in twenty-eight states, Sarah Bollasina Fandry, Comment, *The Goals of Marriage and Divorce in Missouri: The State's Interest in Regulating Marriage, Privatizing Dependence, and Allowing Same-Sex Divorce*, 32 ST. LOUIS U. PUB. L. REV. 447, 470 (2013), and Alaska enacted the first constitutional amendment banning same-sex marriage, see ALASKA CONST. art. I, § 1.25, all between 1995 and 1998. Following a decision recognizing the right of same-sex couples to marry under the state constitution by the Massachusetts Supreme Judicial Court in 2003 in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), constitutional amendments banning same-sex marriage passed in twenty-three states from 2004 to 2006 alone. See NAT'L GAY & LESBIAN TASK FORCE, STATE LAWS PROHIBITING RECOGNITION OF SAME-SEX RELATIONSHIPS (2013), available at [http://www.nglft.org/downloads/reports/issue\\_maps/samesex\\_relationships\\_5\\_15\\_13.pdf](http://www.nglft.org/downloads/reports/issue_maps/samesex_relationships_5_15_13.pdf). As of July 2013, thirty-two states have statutory bans and twenty-nine states have constitutional bans on same-sex marriage. See *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Sept. 29, 2013).



even set back the cause because of the backlash they provoke.<sup>407</sup> Today, however, the dramatic evolution of the marriage debates is prompting some to reconsider these views.<sup>408</sup>

The marriage equality debates suggest, first, that legislation or litigation posing a serious threat to an entrenched status order is likely to provoke deep conflict, and second, that equality law may work through indirect and informal pathways in conflicts of this kind.

Looking back, it appears that escalating conflict in defense of tradition may itself be the face of change — the sign that legislation or litigation threatens long-settled understandings.<sup>409</sup> Authority threatened will seek to entrench itself.<sup>410</sup> And, authority turns to law to entrench custom when custom is in contest.<sup>411</sup> For these and other reasons, con-

<sup>407</sup> Prominent exponents of this view included Professor Gerald Rosenberg and Professor Michael Klarman. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 415–19 (2d ed. 2008) (arguing that litigating marriage was counter-productive); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 812–15 (2006). Professor Klarman has recently qualified his views in part. Compare Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 *MICH. L. REV.* 431, 459–73 (2005) (“Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over ‘outside interference’ or ‘judicial activism,’ and they alter the order in which social change would otherwise have occurred.” *Id.* at 473.), with MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 167–69 (2012) [hereinafter KLARMAN, *FROM THE CLOSET TO THE ALTAR*] (“Political backlash results from government action that strongly contravenes public opinion. Whether that action derives from legislatures or courts seems relatively unimportant. Yet courts are more likely than legislatures to take action that is sufficiently deviant from public opinion to generate powerful backlash.” *Id.* at 169.). See also Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 *TEX. L. REV.* 1185, 1192–95 (2013) (reviewing KLARMAN, *FROM THE CLOSET TO THE ALTAR*, *supra*) (observing the shift in emphasis from Klarman’s earlier work).

<sup>408</sup> For an account that incorporates consideration of backlash into an analysis of how the marriage litigation advanced advocates’ goals, see William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 *B.U. L. REV.* 275 (2013). See also KLARMAN, *FROM THE CLOSET TO THE ALTAR*, *supra* note 407, at 174–80 (observing that while court decisions may provoke backlash, they also can motivate and shape the aims of adversaries in politics).

For early suggestions that the conflict could have constructive effects, see, for example, Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 *WM. & MARY BILL RTS. J.* 1493 (2006); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 *LAW & SOC’Y REV.* 151, 155–60 (2009); Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941 (2011); and Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 *FLA. ST. U. L. REV.* 467 (2012).

<sup>409</sup> See Siegel, *Constitutional Culture*, *supra* note 32, at 1362–63 (locating backlash in the movement-counter-movement dynamic); *supra* p. 75 (illustrating backlash in response to legislative as well as judicial decisions).

<sup>410</sup> Cf. Balkin, *supra* note 377, at 2328 (discussing status competition as a “method for groups who enjoy higher status to preserve their prerogatives”).

<sup>411</sup> Cf. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 968–69 (2002) (recounting how drafters of the Fourteenth Amendment added “male” to the Constitution for the first time, in order to entrench customary

flict is likely to be protracted, and change, if any, slow. Advocates can deliberate about the best directions in which to direct conflict of this kind, when opportunities permit choice; but it is hard to imagine change of this kind without profound and sustained conflict. In such cases, conflict persists, not only because stakes are high, but also because advocates appreciate that conflict itself guides change. We may represent constitutional understandings in frames of consent, and imagine politics as a practice of consensus.<sup>412</sup> But, those debating constitutional questions act on the understanding that disagreement shapes meaning and relationships, and has myriad constructive effects.<sup>413</sup>

For these reasons, equality law often operates through the conflict it provokes. Courts pronouncing law in the midst of conflict play multiple roles, only some of which involve conflict resolution in the conventional sense. We can see that in the marriage debates, courts exercised authority indirectly, as they injected constitutional questions into democratic deliberation, making minority voices audible and informing political conflict with constitutional values.<sup>414</sup>

One can make out this dynamic, however unintended, in the first marriage equality judgments that citizens mobilized to repudiate.<sup>415</sup> The cascade of hostile legislation repudiating decisions that recognized

understandings and make clear that they were excluding women's newly emerging claims for the vote).

<sup>412</sup> See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011) (critically analyzing "consensus constitutionalism").

<sup>413</sup> Responding to the Court's decision in *Windsor*, the political director of the National Organization for Marriage observed: "Our challenge is to let the court see they're not going to get away with this without a massive public revolt." Trip Gabriel, *A.C.L.U. Sues Pennsylvania over Ban on Gay Marriage*, N.Y. TIMES, July 10, 2013, at A11 (quoting Frank Schubert) (internal quotation marks omitted). Participants understand that disagreement shapes law. See Siegel, *Constitutional Culture*, *supra* note 32 (showing how constitutional culture provides the understandings of role and practices of argument that enables social movement conflict to guide development of constitutional law); see also Post & Siegel, *supra* note 35, at 375 (offering a theory of democratic constitutionalism that "analyzes the practices employed by citizens and government officials to reconcile . . . potentially conflicting commitments" of the American constitutional order "to the rule of law and to self-governance").

<sup>414</sup> See *supra* pp. 78–79 (discussing *Romer v. Evans*, 517 U.S. 620 (1996), which was decided during debates over DOMA); *infra* note 425 (discussing *Baker v. State*, 744 A.2d 864 (Vt. 1999)); cf. Post & Siegel, *supra* note 35, at 430 ("[*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 333 (1992),] shows how judges can use flexible constitutional standards to channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims.").

<sup>415</sup> The first two judgments recognizing equality claims for access to marriage (in the Supreme Court of Hawaii and a trial court in Alaska) were reversed by constitutional amendment. See William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 874 (2001). The Supreme Court of Vermont, which ruled on the question shortly thereafter, adapted its approach. It declared the exclusion of same-sex couples a violation of the state constitution's "common benefits" clause, but left to the legislature the choice whether to remedy the violation by including same-sex couples in marriage or enacting a civil union law giving them all the practical benefits of marriage. See *Baker*, 744 A.2d. at 888–89.

the equality claims of same-sex couples seeking to marry began to persuade a movement, and increasingly the public, that questions of equal citizenship were at stake in the design of marriage — in forms most had not imagined equality before.<sup>416</sup> Claims for equal treatment can become increasingly intelligible, even as they are repudiated in conflict.

Federal constitutional decisions in turn helped shape the trajectory of debate over marriage. After *Romer* declared that Colorado's exclusionary ordinance expressed unconstitutional animus,<sup>417</sup> and *Lawrence v. Texas*<sup>418</sup> struck down a law criminalizing same-sex sodomy as denying the dignity and respect owed persons in same-sex relationships,<sup>419</sup> the arguments for preserving traditional marriage began to change. Expressions of revulsion<sup>420</sup> were now tempered by the requirement of giving reasons, at least in public places. Under these constraints, over time, the justifications for excluding same-sex couples from marriage would evolve, going through a process of "preservation-through-transformation."<sup>421</sup> Arguments for preserving traditional marriage addressed to public audiences shifted away from moral disapproval of gay people and began to justify the exclusion of same-sex couples from marriage more respectfully, in terms focused on the distinctive needs and vulnerabilities of straights.<sup>422</sup> *Lawrence* moved further, recogniz-

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<sup>416</sup> In this sense, backlash to claims for marriage equality, like backlash to African American claims for the vote, created meanings and sympathies that defenders of tradition did not intend. Backlash to claims for marriage equality played an important role in persuading a movement born in a quest for sexual freedom to embrace the cause of marriage. And the conflict demonstrated for the public that larger questions of equal citizenship were at stake. On advocates' initial skepticism about claims for marriage equality, see, for example, Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20 (addressing those in the movement holding such views); and Sheryl Gay Stolberg, *In Fight for Marriage Rights, "She's Our Thurgood Marshall,"* N.Y. TIMES, Mar. 28, 2013, at A19 (quoting movement leader recalling resistance to embracing marriage within the movement).

<sup>417</sup> *Romer*, 517 U.S. at 625–36.

<sup>418</sup> 539 U.S. 558 (2003).

<sup>419</sup> *Id.* at 578–79.

<sup>420</sup> See *infra* note 422.

<sup>421</sup> See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 32, at 1113 (quoting Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996)); see also *id.* ("[S]tatus-enforcing state action evolves in form as it is contested."). For another example of preservation through transformation, consider the evolution of justifications for applying strict scrutiny to affirmative action, from reasons openly concerned with the interests of whites, to reasons emphasizing the universal and common benefits in restricting the use of racial classifications. See *supra* section II.B.1, pp. 38–44.

<sup>422</sup> The record for DOMA openly denigrates gay couples. See 142 CONG. REC. 17,082 (1996) (statement of Rep. Lamar Smith) ("Same-sex 'marriages' demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior."); *id.* at 17,070 (statement of Rep. Robert Barr) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."). By the 2000s, constitutional arguments for excluding same-sex couples had increasingly come to focus on the vulnerabilities of heterosexual couples — on government's need to create incentives for straight couples to marry and raise children

ing the dignity of persons in same-sex relations and affirming their liberty and equality, offering new encouragement to courts to recognize claims for marriage arising under state constitutions.<sup>423</sup>

And when advocates worked to educate the public and raised the marriage-equality question in states where courts were better insulated from popular challenge,<sup>424</sup> courts responded in ways that fatefully changed the shape of the conflict.<sup>425</sup> The first decisions to recognize marriage equality under state constitutions changed the national

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in wedlock. The shift supplied courts with new and more respectful grounds on which to reject marriage equality claims. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (observing that same-sex couples “do not become parents as a result of accident or impulse” where persons in opposite-sex relations do, so “promoting stability in opposite-sex relationships will help children more[, which] . . . is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only”). *See generally* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009) (tracing the evolution of the accidental procreation argument). Other relatively more gay-respecting arguments for gay exclusion might focus on the need for uniformity in federal programs. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting) (“DOMA avoids difficult choice-of-law issues that will . . . arise absent a uniform federal definition of marriage.”).

There are religious and natural law arguments for defining secular marriage as intrinsically about procreation by opposite-sex couples, which assert that the institution of marriage is threatened or compromised by the inclusion of couples who do not “naturally” procreate. These arguments can express their normative judgments about same-sex couples more respectfully. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (“[T]he ‘traditional’ or ‘conjugal’ view, sees marriage as an intrinsically opposite-sex institution. . . . [Proponents] argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.” (citing SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 23–28 (2012))).

<sup>423</sup> See Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 99 (2003) (examining “how closely *Lawrence* comes to explicitly melding the concerns of equal protection with those of due process”). On liberty and equality in *Lawrence*, see Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1458–60 (2004); Laurence H. Tribe, *Essay, Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); and Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776–81 (2011).

*Lawrence* figures prominently in the first marriage equality decisions. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 421, 438, 451 (Cal. 2008) (citing *Lawrence*); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 433–34, 438, 444–45, 465–70, 479, 481 (Conn. 2008) (same); *Varnum v. Brien*, 763 N.W.2d 862, 876, 885, 889 (Iowa 2009) (same); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 953, 959 (Mass. 2003) (same).

<sup>424</sup> See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 28 (2005) (recounting that the attorney for the plaintiffs in *Goodridge* reassured the justices at oral argument that a decision recognizing plaintiffs’ right to marry would not be easily reversed because “the earliest a constitutional amendment could go into effect in Massachusetts would be 2006 [after] three full years of same-sex marriages in the Commonwealth, at the end of which non-LGBT people would see that nothing had been taken away from their marriages”).

<sup>425</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999) (recognizing a constitutional right under state “common benefits” clause that could be redressed by access to marriage or civil union with all the practical incidents of marriage); *Goodridge*, 798 N.E.2d 941 (first decision requiring a state to marry same-sex couples).

conversation by the simple act of authorizing same-sex couples to marry — diffusing dread and stereotype for some, and for others, inspiring empathy and emulation.<sup>426</sup> The decisions had other local effects that reverberated with national implications. It was in the jurisdictions where courts first recognized the equality rights of same-sex couples that legislatures first recognized the rights of same-sex couples to marry, demonstrating that legal recognition of same-sex marriage was possible through democratic deliberation.<sup>427</sup>

It was some two decades after the Supreme Court's decision in *Bowers v. Hardwick*<sup>428</sup> and a decade after *Romer* that marriage litigation began in federal courts. In the intervening period, popular views about same-sex relationships had undergone profound transformations that flowed from myriad sources, no doubt the most important of which was the increasing visibility of gays in the family, at work, and in the media.<sup>429</sup> Yet the public's evolving views about marriage were also importantly the fruit of conflict over, and through, law. California offered a kaleidoscope of the conflict's forms. The fight over marriage equality moved from the legislature, to the streets, to the courts, to popular referenda, and culminated in a trial, in which nationally renowned advocates presented arguments, honed through years of struggle, to a national audience, and a district court judge authored a massive opinion recounting conclusions of fact and law he understood the trial to establish.<sup>430</sup>

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<sup>426</sup> For reflections on the way the appearance of actually married same-sex couples in Massachusetts countered stereotypes, see Eskridge, *supra* note 408, at 303. Recognition of marriages in Massachusetts prompted the mayor of San Francisco, Gavin Newsom, to begin issuing marriage licenses. See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1276–80 (2010); Siegel, *Constitutional Culture*, *supra* note 32, at 1415–18.

<sup>427</sup> The first two states to recognize same-sex marriage by legislation were Vermont and Connecticut, where the Gay & Lesbian Advocates & Defenders (GLAD) had previously filed litigation to secure same-sex marriage. See CONN. GEN. STAT. ANN. § 46b-20a (West Supp. 2010); VT. STAT. ANN. tit. 15, § 8 (2012). For the judicial decisions that preceded the legislation, see *Kerrigan*, 957 A.2d 407; and *Baker*, 744 A.2d 864.

<sup>428</sup> 478 U.S. 186 (1986).

<sup>429</sup> It is hard to know what weight to give to poll respondents' own accounts, especially given interaction among potential variables. Nonetheless, polls suggest personal relationships play a crucial role in changing views. A 2008 study found that for adults whose views toward gays and lesbians had become more favorable in the last five years, 79% attributed the change in some part to knowing a gay or lesbian person, 41% to reading about gay and lesbian issues in the news, 34% to seeing gay or lesbian characters on TV, and 29% to seeing a gay or lesbian character in movies. HARRIS INTERACTIVE, PULSE OF EQUALITY: A SNAPSHOT OF U.S. PERSPECTIVES ON GAY AND TRANSGENDER PEOPLE AND POLICIES 31 (2008), available at <http://www.glaad.org/files/HarrisPoll120308.pdf>.

<sup>430</sup> See Cummings & NeJaime, *supra* note 426, at 1242–304; Douglas NeJaime, *The View from Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV. DISCOURSE 182, 188–204 (2013), <http://www.uclalawreview.org/pdf/discourse/61-13.pdf> (discussing conflict over marriage in California from its inception to the Supreme Court decision in *Perry*).

2. *The Marriage Cases*. — It was *Perry*'s potential to decide marriage law in some or all of the fifty states that made it the focus of national attention — and for this very same reason a highly charged case for judicial decision. Not only conservatives but also many liberals urged the Court to narrow or avoid decision in *Perry*, discussing standing as an attractive tool.<sup>431</sup>

Justice Kennedy intimated that concerns about the Court's addressing the merits shaped standing determinations in the marriage cases. He openly discussed "prudential" institutional considerations that informed the majority's interest in finding standing in *Windsor*,<sup>432</sup> and he adverted to internal Court discussion that connected merits and standing questions in his *Perry* dissent, when he observed: "Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject."<sup>433</sup> Justice Kennedy's comments suggest that some Justices may have decided *Perry* on justiciability grounds to allow popular debate over state marriage laws to continue, informed, but not directly controlled, by the Court's decision on federal law in *Windsor*.

By addressing the merits in *Windsor* only, the five-Justice majority enforced equality values, directly, against the federal government and, indirectly, against the states. The Court struck down section 3 of DOMA, which denied recognition under federal law to state-sanctioned same-sex marriages;<sup>434</sup> it offered reasons for invalidating the federal law that were plainly designed to shape debate over marriage in the several states, without decisively resolving it. The dissenting opinions of Chief Justice Roberts and Justice Scalia discuss at length the grounds and scope of the majority's judgment, illuminating its deliberately constructed ambiguities.<sup>435</sup>

<sup>431</sup> On options for narrowing *Perry*, see, for example, Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 528–37. On the virtues of a standing decision that would avoid decision on the merits in the marriage cases, see, for example, Cass Sunstein, *For the Supreme Court, Silence Can Be Golden*, BLOOMBERG (Apr. 1, 2013), <http://www.bloomberg.com/news/print/2013-04-01/for-the-supreme-court-silence-can-be-golden.html>.

<sup>432</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2685–88 (2013).

<sup>433</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).

<sup>434</sup> Section 3 of DOMA was the particular section at issue in *Windsor*. *Windsor*, 133 S. Ct. at 2683. The provision provides that for all federal statutes, rules, and regulations "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2012).

<sup>435</sup> See *Windsor*, 133 S. Ct. at 2696–97 (Roberts, C.J., dissenting); *id.* at 2705–07, 2709–10 (Scalia, J., dissenting).

In demonstrating how section 3 of DOMA violates equality values, the *Windsor* opinion locates DOMA in a federated constitutional order. The opinion opens by paying tribute to federalism as a system of governance that enables living constitutionalism, in which community judgment about the meaning of “unjust exclusion” can evolve<sup>436</sup> and citizens over time learn better to respect the “equal dignity of same-sex marriages.”<sup>437</sup> The opinion then recounts a tradition of state control over domestic relations law<sup>438</sup> — a tradition that has historically been invoked to justify restricting Congress’s power to reform traditional status relationships.<sup>439</sup> But, *Windsor* expressly avoids imposing federalism restrictions on Congress’s power to regulate families.<sup>440</sup> *Windsor* instead invokes traditions of “family localism” as part of an equality argument that restricts Congress’s power to enforce traditional status relations. The decision reads DOMA’s “unusual” departure

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<sup>436</sup> *Id.* at 2689 (majority opinion); see also *id.* (“[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”).

<sup>437</sup> See *id.* at 2693. For accounts of the dynamic nature of norm creation in federal structures, see Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2009) (describing a federalism “in which localities serve as staging grounds for national debates, and the decisions of the variegated periphery feed back into national policymaking[;] . . . in which the energy of outliers serves as a catalyst for the center”); and Judith Resnik, *Federalism(s)’s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY (James Fleming ed.) (forthcoming Jan. 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2284200](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284200).

<sup>438</sup> See *Windsor*, 133 S. Ct. at 2691–92.

<sup>439</sup> The claim that control over the whole of domestic relations belongs to the states has been invoked to oppose federal intervention in status relations of the common law household, including slavery, labor, and husband/wife. For examples of this tradition of federalism argument, see Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1764–68 (2005); Judith Resnik, *Essay, Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 644–46 (2001); and Siegel, *supra* note 411, at 1035–39. See also *id.* at 1038 (observing that traditions of family localism invoked against a woman’s right to vote have also been invoked to prevent federal efforts to reform other status relations of the common law household); *id.* (“[S]lavery was once denominated a ‘domestic relation’ beyond the reach of federal law, as was the labor relationship as the Court reminded us in *Carter Coal*. Domestic relations may traditionally be a matter for local self-government in our federal system, but, as history reveals, the particular relationships this tradition insulates from federal regulation are constantly in flux. . . . As the nation’s understanding of equal citizenship norms changed, the federal government intervened in state regulation of the family to vindicate those new understandings of its foundational commitments.”). On the federal government’s longstanding role in the family, see generally, for example, Kristin A. Collins, “*Petitions Without Number*”: *Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 LAW & HIST. REV. 1 (2013).

<sup>440</sup> See *Windsor*, 133 S. Ct. at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution.”); see also *id.* at 2691 (observing that state laws on marriage “must respect the constitutional rights of persons”).

from traditions of family localism<sup>441</sup> and Congress's failure to identify a reason — related to the programs DOMA regulates — for adopting a federal definition of marriage<sup>442</sup> as evidence of “improper animus or purpose.”<sup>443</sup>

Were irrationality — or lack of a reason — evidenced by these structural features of DOMA the only grounds on which *Windsor* inferred improper purpose, *Windsor*'s reasoning might be confined to DOMA only.<sup>444</sup> But *Windsor* invalidated DOMA as manifesting unconstitutional animus understood as hostility or disapproval,<sup>445</sup> and, to build this argument, pointed to other aspects of the federal law. These features of the *Windsor* opinion expand its reach. They were designed to exert both direct and indirect authority, invalidating section 3 of DOMA on grounds that implicate, and easily could be read to impugn, other restrictions on same-sex marriage of recent and even older origin. The opinion does not bind future judgments about these restrictions by the formal technique of adopting heightened scrutiny. But neither does the opinion practice deference associated with rational basis review, even rational basis of an elevated kind. The Court extends the potential reach of its decision by tying the judgment of unconstitutionality to features of DOMA that the statute shares with other legislation — and by reasoning about the meaning of the Constitution's equality guarantees in ways the Court has not for years.

The *Windsor* opinion does not judge the constitutionality of section 3 of DOMA only on the ground of animus as irrationality. The opinion characterizes the law as reflecting animus of two other kinds. The first might be described as hostility toward a politically unpopular group: “The Constitution's guarantee of equality ‘must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”<sup>446</sup> But the opinion then immediately goes on to discuss the animus that made DOMA's disparate treatment of married couples unconstitutional as a form of “disapproval.” The opinion points to “DOMA's unusual deviation

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<sup>441</sup> See *id.* at 2693 (“In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

<sup>442</sup> See *id.* at 2694 (characterizing DOMA as “a system-wide enactment with no identified connection to any particular area of federal law”).

<sup>443</sup> *Id.* at 2693.

<sup>444</sup> In this respect it is interesting to compare *Windsor* with the First Circuit's decision on DOMA, which relied even more heavily on DOMA's departure from traditions of family localism. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (declaring DOMA unconstitutional on equal protection grounds and observing that “in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity”).

<sup>445</sup> See *Windsor*, 133 S. Ct. at 2693.

<sup>446</sup> *Id.* (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).



from the usual tradition of recognizing and accepting state definitions of marriage” as “strong evidence of a law having the purpose and effect of disapproval of that class.”<sup>447</sup> The opinion finds further evidence of disapproval in a statement in the House Report published during the debates on DOMA’s enactment, which concluded that DOMA’s disparate treatment of same-sex marriages “expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality’” and described the purpose of the law as “protecting the traditional moral teachings reflected in heterosexual-only marriage laws.”<sup>448</sup> The Court indicted DOMA’s disparate treatment of same-sex marriages: “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>449</sup> Unless one imposes context-based limitations on this passage — so that it applies to laws that discriminate among marriages only — the passage indicts disparate treatment based on disapproval of a kind that is not limited to section 3 of DOMA. A willing judge could find evidence of this kind of animus in most state laws enacted to prevent the recognition of same-sex marriage since Hawaii first recognized the constitutional right of same-sex couples to marry.<sup>450</sup>

Indeed, a willing judge could even find support in *Windsor* for invalidating or modifying much older provisions of marriage law that have been read to exclude same-sex couples. This is because *Windsor* continues on, beyond these passages, to find DOMA’s disparate treatment of same-sex couples to violate equality for reasons as much concerned with the federal law’s effects and meaning as its purpose to disapprove. In determining whether disparate treatment of same-sex marriages in section 3 of DOMA violated constitutional equality principles, *Windsor* continuously considers the law’s purpose and effect.<sup>451</sup> The concluding passages of the opinion that most clearly and forcefully condemn disparate treatment of marriage in section 3 of DOMA fo-

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<sup>447</sup> *Id.*

<sup>448</sup> *Id.* (quoting H.R. REP. NO. 104-664, at 16 (1996) (footnote omitted)) (internal quotation mark omitted).

<sup>449</sup> *Id.* (quoting H.R. REP. NO. 104-664, at 16).

<sup>450</sup> See *id.* at 2707, 2709–10 (Scalia, J., dissenting) (“How easy it is, indeed how inevitable, to reach the same conclusion [as the majority did with respect to DOMA] with regard to state laws denying same-sex couples marital status.” *Id.* at 2709.). After *Windsor*, advocates immediately filed suit seeking to invalidate a number of these state restrictions on same-sex marriage. See, e.g., Gabriel, *supra* note 413 (describing the ACLU’s post-*Windsor* litigation).

<sup>451</sup> *Windsor* seven times expresses concern with law’s purpose and effect, see *Windsor*, 133 S. Ct. at 2692, 2693 (repeats twice), 2694, 2695, 2696 (repeats twice), and dwells in detail on DOMA’s “principal effect” of making same-sex marriages “unequal,” *id.* at 2694.

cus on the law's impact on the families it affected,<sup>452</sup> what the law's enforcement means to them:

*By creating two contradictory marriage regimes within the same State . . . DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples.*<sup>453</sup>

In explaining why the disparate treatment mandated by section 3 of DOMA is unconstitutional, the Court emphasizes the message the law's enforcement communicates to people, what it "tells" them.<sup>454</sup> This is not a formal statement of legislative history, much less an account of government's purposes. This is an account of how people understand and experience the law.

Of course social meaning is shared, but it is also contestable.<sup>455</sup> There are many advocates who would define marriage in terms that exclude same-sex couples, but, these advocates insist, do not demean same-sex couples.<sup>456</sup> *Windsor* does not expressly repudiate their claims. The case leaves unresolved the constitutionality of exclusions justified in more respectful ways. Yet, in *Windsor*, the majority reasoned about the social meaning of disparate treatment in ways that have been unmistakably informed by long-running public debate — and by the experience and standpoint of the excluded. These passages of the opinion are, in method, akin to the affirmative action opinions in considering how the citizen experiences law in deciding the law's constitutionality. But *Windsor* endeavors to give voice to perspectives of the minority, the historically excluded group, in ways the affirmative action opinions do not. The result is an equality opinion unlike any the Court has handed down in quite some time.

This equality opinion begins from the appreciation that, in the American constitutional order, community judgment about the meaning of "unjust exclusion" can evolve.<sup>457</sup> The opinion recapitulates that

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<sup>452</sup> See *id.* at 2694–95.

<sup>453</sup> *Id.* at 2694 (emphasis added) (citation omitted).

<sup>454</sup> *Id.*

<sup>455</sup> Cf. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

<sup>456</sup> For examples, see *supra* note 422 (discussing and illustrating preservation through transformation in the justifications for denying the right to marry to same-sex couples).

<sup>457</sup> See *Windsor*, 133 S. Ct. at 2689.

learning process, as it endeavors to understand, and to make plain to others, how law can express and enforce inequality in “status,”<sup>458</sup> as *Brown* did.<sup>459</sup> These concerns are essential prerequisites of equal protection, more fundamental than any standard of review.

#### IV. CONCLUSION: EQUALITY’S FUTURE

The path from the early state court judgments to *Windsor* illustrates how law that intervenes in status relationships can help unsettle beliefs long thought reasonable. This is why equality law provokes contest, and it is how, even in contest, equality law can exert force. By unsettling judgments about legitimacy, equality law can amplify the voices of those who challenge tradition, even as it encourages inequality to assume new forms. Because laws and decisions that vindicate equality values often provoke conflict of this kind, they engender change in paradoxical ways. A half century after *Brown*, incarceration and violence afflict minority communities; yet, we have an African American President who invites conversation about the afflictions’ many causes, asking the nation “to do some soul-searching” about racial bias and the criminal law when the Supreme Court no longer will.<sup>460</sup>

Courts can play different roles in equality conflicts, as the decades since *Brown* teach. Courts can enable those who challenge entrenched inequalities. Or courts may withdraw, inhibit, or oppose changes of this kind.

A difference in judicial role visibly separates the race and sexual orientation decisions of the 2012 Term — though it is a difference that reflects the vote of only one Justice. In *Windsor*, Justice Kennedy reasons about laws defining marriage with attention to the understanding and experience of those whom the law has historically excluded. By asking whether a law’s enforcement “tells” minorities they are “unworthy,” or by asking whether a law’s enforcement “demeans” and “humiliates” them, Justice Kennedy reasons about equality in the tradition of

<sup>458</sup> See *id.*; see also *supra* p. 74 (quoting *Windsor*’s discussion of “status”).

<sup>459</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”). On *Brown*’s role in the marriage debates, see MARTHA MINOW, IN *BROWN*’S WAKE 188–89 (2010).

<sup>460</sup> See *supra* notes 233–234 and accompanying text (observing that equal protection law has had little role in interrogating rising incarceration rates). For President Obama’s speech, see President Barack Obama, Remarks on Trayvon Martin (July 19, 2013), available at [http://www.washingtonpost.com/politics/president-obamas-remarks-on-trayvon-martin-full-transcript/2013/07/19/5e33e3bea-f09a-11e2-af9e-ea873b7e0424\\_story.html](http://www.washingtonpost.com/politics/president-obamas-remarks-on-trayvon-martin-full-transcript/2013/07/19/5e33e3bea-f09a-11e2-af9e-ea873b7e0424_story.html). President Obama was speaking amid protests against racial profiling that were provoked by the acquittal, on grounds of self-defense, of a man who pursued and killed an unarmed black youth.

*Brown*.<sup>461</sup> He reasons in a fashion that, over the decades, has become increasingly rare in race cases decided in the Supreme Court.

When the Roberts Court has appealed to *Brown*, it has not been to protect minorities by striking down a law that “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>462</sup> The Court does not generally take equal protection cases involving practices alleged to inflict racial denigration, humiliation, or subordination on minorities. Instead, the Roberts Court has appealed to *Brown* to protect members of majority groups by striking down laws that promote racial integration.<sup>463</sup> Over the decades, the Court has construed *Brown* narrowly so that it does not apply to cases commonly brought by members of racial minorities and has construed *Brown* expansively so that it does apply to cases commonly brought by members of majority groups.<sup>464</sup>

On one view — a view some Justices appear to hold — this change in the Court’s role is appropriate because racial minorities are now the favorites of the law, and discrimination against them is no longer common.<sup>465</sup> Yet, this is a view that Justice Kennedy has clearly repudiated.<sup>466</sup> Justice Kennedy assumes a role played by Justices Powell and O’Connor before him in which, unlike other conservatives, he has made clear that government can employ race-conscious means to promote minority opportunities subject to close judicial oversight. In guiding a sharply divided Court over the decades, these “swing” Justices seem to understand their role in equal protection cases as permitting government to promote diversity and equal opportunity in race-conscious ways, while tightly restricting government interventions of this kind to protect the interests of those who claim the laws are unfair.<sup>467</sup> The Rehnquist Court increasingly chose equal protection cases

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<sup>461</sup> Compare *Windsor*, 133 S. Ct. at 2694, with *Brown*, 347 U.S. at 494.

<sup>462</sup> *Brown*, 347 U.S. at 494.

<sup>463</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (plurality opinion) (declaring school district efforts to integrate unconstitutional in an opinion that concluded with the Chief Justice asking “which side is more faithful to the heritage of *Brown*,” *id.* at 747, and equating race-conscious efforts to integrate schools with race-conscious efforts to segregate schools).

<sup>464</sup> See *supra* Parts I–II, pp. 9–58.

<sup>465</sup> See *supra* note 363 and accompanying text (discussing Chief Justice Roberts’s opinion in *Shelby County*); *supra* p. 72 (Justice Scalia’s remarks in that case’s oral argument); see also *Parents Involved*, 551 U.S. at 748 (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>466</sup> See *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring) (“The enduring hope is that race should not matter; the reality is that too often it does.” *Id.* at 787.).

<sup>467</sup> See Siegel, *From Colorblindness to Antibalkanization*, *supra* note 205 (discussing the concerns about social cohesion invoked by Justices who vote both to permit and to severely restrict government’s race-conscious efforts to promote minority opportunities); see also *supra* pp. 43–44.

on this model, changing the kinds of fairness questions on which equal protection review focused.

This paradigm persists in the race cases of the Roberts Court. It has been a very long time since the Court's equal protection docket focused on the harms that representative government inflicts on racial minorities. When the Roberts Court teaches about the harms of racial classification — when it selects cases to demonstrate that government should respect people's dignity and treat them fairly, as individuals, to avoid racially divisive messages — the Court takes equal protection cases about affirmative action, not racial profiling. The Court's selection of cases reveals much about the kinds of empathy that now animate equal protection review.

American law has the resources on which a court could draw if a court were moved to enforce equal protection in terms more responsive to the fairness and equality concerns of racial minorities. In evaluating state action that does not classify on the basis of race, such a court might decide a law's purpose with greater attention to its racial impact, as courts once regularly did in desegregation cases,<sup>468</sup> and as the Roberts Court modeled more recently in calling disparate impact law into constitutional question.<sup>469</sup> Such a court could redirect the concept of a racial classification to contexts of racial differentiation that present fairness concerns to other groups, and consider how members of these groups experience law's meaning and impact when government considers race in pursuing legitimate ends; this was the strategy the Court long ago employed to build the law now governing affirmative action.<sup>470</sup> As the affirmative action cases illustrate, judges consider how people understand the meaning and experience the impact of state action when judges decide what forms of state action equal protection constrains; the concern cannot be dismissed as foreign, a constitutional question belonging to another time or place. *Windsor* demonstrates the continuing life of this tradition. What makes *Windsor* radiate with significance is that the decision considers the law's meaning and impact with attention to the perspectives of the historically excluded, as *Brown* did. *Windsor* suggests that courts consider how minorities understand and experience the law when deciding what guarantees of equal protection require.

Imagine. Imagine if an appointment to the Supreme Court produced a majority of Justices who reasoned about stop and frisk and other practices of suspect apprehension that differentiate by race in the ways the majority reasoned in *Windsor* — or even *Fisher*. Put aside

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<sup>468</sup> See *supra* notes 66–77 and accompanying text.

<sup>469</sup> See *supra* section II.B.3, pp. 51–58.

<sup>470</sup> See *supra* sections II.A–B, pp. 31–58.

standards of review.<sup>471</sup> Imagine a Court enforcing equal protection by asking whether a law's enforcement "tells" minorities they are "unworthy," or by asking whether a law's enforcement "demeans" and "humiliates" them.<sup>472</sup> Imagine a case on suspect apprehension that explained that when government classifies by race, even for benign purposes, judicial oversight is required to ensure that government employs means that respect people's dignity and treat them fairly, as individuals, in order to avoid racially divisive messages. Imagine a Court even suggesting that the constitutionality of a law might require attention to these matters. Imagine a Court at least prepared to get out of the way when minorities secure protection through the political processes. Or, imagine a Court prepared to intervene in politics to guard against laws that violate expectations of fair dealing and engender social division, for minority as well as majority groups. The resources are in our equal protection tradition. Imagine.

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<sup>471</sup> *Windsor*, like *Brown*, avoids clear statements about its principle of decision and domain of application. On *Brown* and its reception, see, for example, Siegel, *Equality Talk*, *supra* note 22, at 1481–84.

<sup>472</sup> Compare *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).